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Supreme Court of the United States

CINERGY CORPORATION, PSI ENERGY, INC., CINCINNATI GAS & ELECTRIC CO., AND CINERGY SERVICES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA

AND

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW JERSEY, HOOSIER ENVIRONMENTAL COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Seventh Circuit erred in deciding—in square conflict with a Fourth Circuit decision under review this Term in *Environmental Defense* v. *Duke Energy Corp.*, No. 05-848 (oral argument heard Nov. 1, 2006)—that EPA may use enforcement litigation to re-interpret its New Source Review rules to convert existing electric generating plants into "new sources," even though those plants had not undergone "modifications" within the meaning of those rules.

PARTIES TO THE PROCEEDINGS

Pursuant to Supreme Court Rule 14.1, petitioners state that all parties to the proceedings in the court whose judgment is sought to be reviewed are listed in the caption.

RULE 29.6 STATEMENT

Cinergy Corp. merged with Duke Energy Corporation during the proceedings below. Duke Energy is the surviving entity. The corporate parties identified in the caption are now subsidiaries of Duke Energy and are now named (in the order they appear in the caption) Cinergy Corp., Duke Energy Indiana, Inc., Duke Energy Ohio, Inc., and Duke Energy Shared Services, Inc.

Duke Energy is publicly traded. No other publicly held company owns more than 10% of Duke Energy's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Cinergy Corporation, Cinergy Services, Inc., PSI Energy, Inc., and Cincinnati Gas & Electric Co. (collectively "Cinergy") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The decision of the Seventh Circuit is published at 458 F.3d 705 (7th Cir. 2006), and is reproduced in the Petition Appendix ("App.") at 1a-8a. The district court's summary judgment order is reported at 384 F. Supp. 2d 1272 (S.D. Ind. 2005), and is reproduced at App. 9a-20a. The district court's order certifying the summary judgment order for interlocutory review is reproduced at App. 23a-25a. The order of the Seventh Circuit granting leave to appeal is reproduced at App. 21a-22a.

JURISDICTION

The Seventh Circuit entered its judgment on August 17, 2006. App. 1a. On November 6, 2006, Justice Stevens extended the time to file this Petition to and including December 15, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES OR OTHER PROVISIONS INVOLVED

Relevant portions of the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*, are reproduced at App. 26a-32a. Relevant portions of the Environmental Protection Agency's regulations, 40 C.F.R. pt. 52, are reproduced at App. 33a-39a.

STATEMENT OF THE CASE

This Petition presents the precise issues that the Court granted certiorari to consider in *Environmental Defense* v. *Duke Energy Corp.* (No. 05-848) ("*Environmental Defense*"). Accordingly, this Petition should be held pending the decision and disposed of in light of the holding in *Environmental Defense*. If, however, the Court does not decide the questions presented in that case, then it should grant this Petition and reverse the judgment of the Seventh Circuit.

This case, like *Environmental Defense*, is an enforcement action brought by the Environmental Protection Agency ("EPA") as part of its 1999 utility "enforcement initiative"—which was an unprecedented and extraordinary attempt to extend the New Source Review ("NSR") requirements of the Clean Air Act ("CAA") to commonplace maintenance, repair, and replacement projects performed over many years at dozens of coal-fired electric power plants. EPA did not interpret the NSR requirements to apply to such projects in the two decades before it launched the enforcement initiative. Nonetheless, the Seventh Circuit held that EPA could interpret its regulations for enforcement purposes to impose massive retroactive liability on Cinergy—endorsing EPA's conclusion that the entire industry had blatantly violated the rules for years while state and federal regulators sat by and watched.

1. Regulatory Background.

The Seventh Circuit's decision is contrary to the CAA and EPA's regulations. NSR requires "new sources" of air emissions to obtain permits before "construction." Because the permit approval process can take years– while the nation's electric supply depends on utilities' availability to run on demand—such "new source review" would be unworkable for ordinary maintenance projects at existing facilities. EPA has acknowledged as much. See 70 Fed. Reg. 61,081, 61,088 (Oct. 20, 2005) (admitting that EPA's enforcement position

"leads to outcomes that have not advanced the central policy of the . . . NSR program").

Recognizing this problem, Congress applied NSR as a general matter "to new major emitting facilities and . . . not . . . existing facilities." 123 Cong. Rec. 18,021 (1977). To that end, NSR applies only to "construction"—which includes existing facilities only when they undergo "modification[s]." 42 U.S.C. §§ 7479(2)(c), 7501(4).[1]

"Modification" had a well-established meaning in 1977, because Congress used that term in the pre-existing New Source Performance Standards ("NSPS") program. To ensure that NSR would be clearly and consistently applied, Congress defined "modification" under NSR to be the same as under NSPS. See *id.* § 7479(2)(c) ("The term 'construction' when used in connection with any source or facility, includes the modification (*as defined in section 7411(a) of this title*) of any source or facility.") (emphasis added); *id.* § 7501(4) (defining "modification" to "mean the same as the term 'modification' *as used in section 7411(a)(4)*") (emphasis added). Thus, as under NSPS, an NSR "modification" occurs only when a "physical change" to a facility will cause an emissions increase. *Id.* § 7411(a)(4). In turn, a project causes an "emissions increase" only if it increases a facility's actual capacity to emit pollutants, in effect creating a "new" emissions source. See 40 C.F.R. §§ 51.100, 52.01(d), 60.2, & 60.14.[2]

NSR imposes more stringent requirements than NSPS, and NSR applies those requirements to a subset of "modifications," called "major modifications." *Id.* §§ 51.166, 52.21. A "major modification" occurs if a "modification" will signifi-

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[1] NSR consists of two programs, Prevention of Significant Deterioration, or "PSD," and Nonattainment New Source Review, or "NNSR." *See* 42 U.S.C. §§ 7470-7492 (PSD); *id.* §§ 7501-7515 (NNSR). Although both programs are at issue in this case, the relevant provisions of each are materially identical. This Petition will refer to them together as "NSR."

[2] Unless otherwise noted, all C.F.R. citations are to the 1987 edition.

cantly increase total annual emissions at the overall source. *Id.* § 52.21(b)(2)-(3), (21). However, the NSR rules' use of "major modification" does not eliminate the requirement that a "modification" must occur to trigger both NSPS and NSR.

EPA made clear immediately after it promulgated its NSR rules that only a "modification" triggers a "major modification" analysis under NSR. See Mem. from Edward E. Reich to Charles Whitmore (Jan. 22, 1981) ("Cargill Determination") (Appellants' Supp. App. 279-80); Mem. from Edward E. Reich to Amasjit S. Gill (June 24, 1981) ("GE Determination") (Appellants' Supp. App. 281-82). In its 1999 enforcement initiative, however, EPA adopted a different approach, arguing that commonplace repair projects trigger NSR even if they do not increase a facility's emissions capacity, because they may allow a facility to avoid breakdowns and thus to operate more hours in the future.[3]

2. This Litigation.

EPA filed its complaint in this case in November 1999, as part of its initial salvo of utility enforcement lawsuits. EPA contended that 55 projects at six of Cinergy's existing midwestern power plants between 1984 and 2001 violated NSR. Each of these projects involved the maintenance, repair, or like-kind replacement of equipment. None of these projects expanded a unit's capacity or altered a unit's design. Each simply allowed Cinergy to continue to run its facilities as they were licensed to run. Thus, at the time these projects occurred, no one at Cinergy believed that they triggered NSR. Nor, evidently, did the various federal, state, and local offi-

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[3] The specific rules applicable here are those adopted in the Indiana and Ohio State Implementation Plans – which for PSD are the federal rules set forth in Part 52, *see* 40 C.F.R. § 52.793 (Indiana); 40 C.F.R. § 52.1884 (Ohio). The relevant provisions of the state NNSR programs are similar. *See* Ohio Admin. Code 3745:15-01 (defining "modification" as in 40 C.F.R. § 52.01(d)); 326 Ind. Admin. Code 1-2-42 (defining "modification" in terms of a unit's potential emissions capacity). For convenience, this Petition will cite the rules set forth in 40 C.F.R. pt. 52.

cials who oversaw and inspected Cinergy's facilities—none of whom ever suggested that NSR permitting requirements had been triggered.

EPA first raised the "emissions increase" issue by moving for partial summary judgment in this litigation. See U.S. Mot. S.J. EPA claimed it has the discretion to adopt a test based on changes in a unit's hours of operation, even without a change in the facility's emissions capacity. *Id.* at 2. Cinergy filed a cross-motion for partial summary judgment, contending that the statute, the regulations, and Seventh Circuit precedent provided that a project causes an emissions increase only if an hourly emissions increase occurs—*i.e.*, if a project is an NSPS "modification"—because only then will the unit's emissions capacity increase. Cinergy Mot. S.J. at 2-3.

In an order issued on August 29 and corrected on September 8, 2005, the district court granted EPA's motion and denied Cinergy's cross-motion. App. 9a, 20a. Rejecting the long-standing presumption that "identical words used in different parts of the same act are intended to have the same meaning," *Sullivan* v. *Stroop*, 496 U.S. 478, 484 (1990), the court held that Congress's incorporation of "modification" from NSPS into NSR "did not limit the EPA's authority to further define 'modification' in the regulations as it deemed fit." App. 16a.

On Cinergy's timely motion, the district court certified its order for interlocutory review. App. 24a. The Seventh Circuit granted permission to appeal, *id.* at 22a, and after briefing and oral argument affirmed the district court's order. *Id.* at 8a. In a cursory opinion, the court failed to address the common-sense argument that a "modification" is required before a "major modification" can occur under EPA's rules. Instead, the court rested its decision on the simplistic observation that the "major modification" rules speak in terms of "annual" increases, not "hourly" increases—a point that no one disputes. *Id.* at 3a-4a. From that basic proposition, the Seventh Circuit leapt to the conclusion that "*any* physical change or change in

operating methods that increases annual emissions is covered." *Id.* at 3a (emphasis added). As a policy justification for this ahistorical conclusion, the court claimed that Cinergy's position "would give the company an artificial incentive to renovate a plant and by so doing increase the plant's hours of operation, rather than to replace the plant," *id.* at 4a—even though nothing in the CAA requires anyone to retire or replace facilities rather than repair them.

The Seventh Circuit acknowledged that the Fourth Circuit reached the opposite conclusion in *United States* v. *Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005), *cert. granted sub nom. Environmental Defense* v. *Duke Energy Corp.*, 126 S. Ct. 2019 (2006). However, the Seventh Circuit dismissed the Fourth Circuit's decision as "out of bounds," based on the misconception that the CAA's provision for expedited judicial review (§ 307(b)) barred consideration of EPA's enforcement interpretation of its rules. App. 7a. The court went on to cite a purported distinction between the NSPS and PSD programs that no party argued and that does not exist, see *id.* at 8a (incorrectly stating that NSPS regulates "input," while PSD regulates "output"), and without further analysis held that EPA had the discretion to interpret the term "modification" differently in the NSPS and NSR programs. *Id.*

REASONS FOR GRANTING THE PETITION

The Seventh Circuit's decision conflicts with the Fourth Circuit's decision in *Duke Energy*, which the Court is reviewing this Term in *Environmental Defense*. That case was argued on November 1 and is waiting a final decision. Accordingly, the Court should hold this Petition for appropriate disposition in light of its decision in that case. If the Court affirms the Fourth Circuit's decision, then it should grant this Petition, vacate the Seventh Circuit's conflicting decision, and remand this case for further proceedings below.

If the Court does not reach the questions presented in *Environmental Defense*, it should grant this Petition to resolve

them. The Seventh Circuit's and the Fourth Circuit's decisions squarely conflict, and similar enforcement actions are pending in the lower courts in the Sixth and Eleventh Circuits. The questions presented also are important, as the grant of certiorari in *Environmental Defense* demonstrates. Finally, the Seventh Circuit's decision is manifestly wrong.

I. THE DECISION BELOW SQUARELY CONFLICTS WITH A FOURTH CIRCUIT DECISION UNDER REVIEW THIS TERM.

The Seventh Circuit acknowledged that its decision conflicts with the Fourth Circuit's decision in *Duke Energy*. Considering the same EPA interpretation of the same regulations, the Fourth Circuit held that Congress's cross-reference between the NSR and NSPS definitions of "modification" required EPA to interpret the term congruently for NSR and NSPS purposes. See *Duke Energy*, 411 F.3d at 550. Because the NSR regulations *can* be interpreted consistently with the NSPS regulations—as the district court demonstrated in the decision under appeal in *Duke Energy*—the Fourth Circuit held that they *must* be so interpreted. *Id.* at 549 n.7. Thus, "in order to undergo 'construction' as defined in [NSR], an existing source must also undergo a 'modification' as defined in NSPS"—meaning "an increase in the hourly rate of emissions." *United States* v. *Duke Energy Corp.*, 278 F. Supp. 2d 619, 642-43 (M.D.N.C. 2003), *aff'd*, 411 F.3d 539 (4th Cir. 2005), *cert. granted sub nom. Environmental Defense* v. *Duke Energy Corp.*, 126 S. Ct. 2019 (2006). The CAA's expedited review provisions were no barrier to this conclusion, because the court was addressing an agency interpretation and not the validity of the regulations. *Duke Energy*, 411 F.3d at 549 n.7.

Contrary to the Fourth Circuit's conclusion, the Seventh Circuit held that the statutory cross-reference between the NSR and NSPS definitions does *not* constrain EPA's discretion to interpret the same term differently under the two programs. App. 8a. Thus, the Seventh Circuit held that the fact that NSPS "modifications" require an hourly rate increase is

irrelevant to NSR. The court also rejected aspects of the "major modification" rules relied upon by the district court and endorsed by the Fourth Circuit in *Duke Energy*—including the exclusion of hours of operation and the use of constant, representative hours in the "emissions increase" calculation. Compare App. 2a-4a, with *Duke Energy*, 278 F. Supp. 2d at 640-44. Finally, the Seventh Circuit rejected the notion that the Fourth Circuit addressed only EPA's interpretation, wrongly concluding that Cinergy (and the Fourth Circuit) raised "an attack on the validity of the regulation rather than an argument about its meaning." App. 6a.[4]

If the Court does not decide the issues in *Environmental Defense* and in this case, this split in authority will obviously persist. Five enforcement actions are pending against utility companies in four circuits: this case; *Environmental Defense*; *United States* v. *Alabama Power Co.*, 372 F. Supp. 2d 1283 (N.D. Ala. 2005), *appeal docketed*, No. 06-15547 (11th Cir. filed Oct. 19, 2006); *United States* v. *American Electric Power Co.*, No. C2-99-1182 (S.D. Ohio filed Nov. 3, 1999); and *United States* v. *Eastern Kentucky Power Co.*, No. 5:04-CV-00034 (E.D. Ky. filed Jan. 28, 2004). The court in *Alabama Power Co.* sided with the Fourth Circuit, observing that the Agency is attempting "to redefine [NSR] through enforcement actions and litigation." 372 F. Supp. 2d at 1306-07. That decision has been appealed. The remaining cases are stayed pending a decision in *Environmental Defense*.

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[4] Although it did not reach the questions presented here—because it held that EPA's interpretations should be addressed in individual enforcement actions—the D.C. Circuit created further tension in this area with *New York* v. *EPA*, 413 F.3d 3 (D.C. Cir. 2005) (per curiam). In *New York*, the D.C. Circuit rejected the argument that Congress incorporated the NSPS rules wholesale into NSR—which was an argument relied upon in the analysis endorsed by the Fourth Circuit in *Duke Energy*. *See id.* at 19-20; *see also* App. 6a-7a (referring to a "circuit conflict" between the Fourth and D.C. Circuits).

II. THE ISSUES PRESENTED ARE OF SIGNIFICANT NATIONAL IMPORTANCE.

The questions presented are of significant national importance, because EPA's enforcement theory exposes utilities and countless other industries to massive retroactive liability as a result of decisions made over the course of more than two decades. In the case of Cinergy and the other electric utilities that have been sued, these decisions were the natural result of efforts to meet the legal obligation to generate an adequate and reliable supply of electricity for the public. See, *e.g.*, Ind. Code § 8-1-2-4; Ohio Admin. Code 4901:1-10-02. To meet this obligation, utilities must continuously maintain and repair their units. Accordingly, Cinergy and other utilities repair and replace thousands of small and large components every year—through projects of precisely the type EPA has targeted in this case. Amicus briefs filed in *Environmental Defense* explain the importance of this issue to other industries, including the chemical, manufacturing, and petroleum industries,[5] as well as to the thousands of people who rely on those industries for their jobs.[6]

If EPA's litigating position is correct, then virtually all manufacturers have been violating NSR for years through their ongoing maintenance and repair efforts. In the electric utility industry alone, EPA's enforcement initiative originally targeted more than 500 maintenance projects at 60 power plants. This enforcement effort thus exposes American industry to massive liability claims. Given the retroactive nature of these liabilities, they present unusually disturbing economic consequences that warrant this Court's attention.

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[5] *See* Br. Mfrs. Ass'n Work Group as *Amicus Curiae* Supp. Resp. Duke Energy Corp. (No. 05-848); Br. *Amicus Curiae* Nat'l Envtl. Dev. Assn's Clean Air Project Supp. Resp. Duke Energy Corp. (No. 05-848).

[6] *See* Br. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, & the Elec. Reliability Coordinating Council as *Amici Curiae* Supp. Resp. (05-848).

This case also presents significant issues regarding the system of cooperative federalism established in the CAA. The CAA "relies on a close and equal partnership between federal and state authorities to accomplish congressional objectives." *Alaska Dep't Envtl. Conservation* v. *EPA*, 540 U.S. 461, 518 (2004) ("*ADEC*") (Kennedy, J., dissenting). Within that partnership, States have "primary responsibility" for "air pollution prevention . . . and air pollution control." 42 U.S.C. § 7401(3). As is set forth in the *Amicus* Brief of Alabama and ten other States in *Environmental Defense*, the EPA position endorsed by the Seventh Circuit "[c]ontradicts . . . EPA's past guidance to state regulators"; "[e]nvisions a breathtaking transfer of enforcement authority from the States to the federal government"; and "[r]isks needlessly overwhelming the limited resources available to state environmental agencies." Brief of the States of Alabama at 1. "By . . . pulling the rug out from underneath" these state agencies "20 years after the fact, EPA has indulged in precisely the inequitable conduct this Court implicitly forbade in" *ADEC*. *Id.* at 10. (internal quotation marks and alteration omitted).

The misuse of litigation as a policymaking tool will not end even if EPA never brings another NSR case. After EPA abandoned its enforcement initiative, advocacy groups continued to file copycat lawsuits against individual companies. In one such suit, the Sierra Club has alleged that a utility performed "major modifications" *60 times* at a single facility between 1978 and 2001. See First Am. Compl. ¶¶ 46, 52-58 in *Sierra Club* v. *Dayton Power & Light*, No. 04-905 (S.D. Ohio filed Oct. 13, 2006). In short, unless and until this Court resolves this issue, it will continue to require the attention and resources of the courts.

III. THE SEVENTH CIRCUIT'S DECISION IS WRONG.

In the end, the Court should grant this Petition because the interpretation EPA is advancing is manifestly wrong. The very notion that utility companies should have obtained NSR

permits for more than 500 maintenance projects at existing plants when Congress intended NSR "not [to] affect existing facilities" cannot be justified. 123 Cong. Rec. at 18,021. It is contrary to EPA's rules, to EPA's original interpretation of those rules, and to the controlling statute.

A. The NSR Rules Apply Only To "Modifications," As Defined Under NSPS.

EPA promulgated the regulations that apply in this case in 1980. See 45 Fed. Reg. 52,676 (Aug. 7, 1980) (the "1980 Rules"). Like the CAA, the 1980 Rules require a source to obtain a permit before beginning "construction" on a project that is subject to NSR. 40 C.F.R. § 52.21(i)(l). "Construction" means the "fabrication, erection, installation, demolition *or modification*" of a facility. *Id.* § 52.21(b)(8) (emphasis added). A "modification," in turn, is defined as it is under the pre-existing NSPS program and under the Act. See *id.* § 52.01(d) (defining "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant"); see also *id.* § 51.100 ("[A]ll terms not defined herein will have the meaning given them in the Act . . . ."). There is no dispute that a project is an NSPS "modification" only if it increases a unit's emissions capacity, as measured by the hourly emissions rate. See *id.* §§ 60.2, 60.14.

The Seventh Circuit ignored these regulations entirely, jumping straight to the definition of "major modification." App. 2a. However, the plain language of the regulations and simple common sense dictate that a project cannot be a "major modification" if it does not constitute a "modification" in the first instance. See *Duke Energy*, 278 F. Supp. 2d at 642-43; 40 C.F.R. § 52.21(b)(8), (i)(1)-(2).

The structure of the "major modification" regulation further limits NSR applicability to projects that increase emissions capacity by increasing a unit's hourly emissions rate. Consistent with EPA's prior regulations, the NSR regulations pro-

vide that neither the term "modification" nor the term "major modification" includes "[a]n increase in the hours of operation." *Id.* §§ 52.01(d)(2)(ii); 52.21(b)(2)(iii)(f). In addition, a "modification" is a "major modification" only if it causes a "significant net emissions increase" at the facility at which a "modified" unit is located. *Id.* § 52.21(b)(2)(i)-(iii). To determine whether a "net" emissions increase will occur as a result of the project—and, if so, how large the annual emissions increase will be—"actual emissions" after the project are determined annually, in tons-per-year, using constant, representative hours of operation. *Id.* § 52.21(b)(21)(ii). "The practical effect [of holding hours of operation constant] is that a net emissions increase can result only from an increase in the hourly rate of emissions." *Alabama Power Co.*, 372 F. Supp. 2d at 1293; see also *Duke Energy*, 278 F. Supp. 2d at 643.

Noting that this "significant net emissions increase" calculation uses "total annual emissions," the Seventh Circuit wrongly concluded that "any physical change or change in operating methods that increases annual emissions is covered." App. 3a. Nowhere do the statute or rules suggest that the use of "tons per year" for "significance" and "netting" purposes expands NSR to apply to a new universe of existing sources—as the Seventh Circuit's decision does. Instead, for the "net emissions increase" calculation, hourly emissions rates (for threshold NSR applicability) are simply converted into annual emissions rates (for netting and significance levels) by multiplying the hourly rate by constant annual hours of operation. See 40 C.F.R. § 52.21(b)(21)(ii). In short, the Seventh Circuit badly misread the rules.

B. The Seventh Circuit Ignored EPA's Prior Interpretations Of The Regulations.

The Seventh Circuit reached its erroneous conclusion in part by ignoring EPA's own interpretation of the rules. Immediately after the promulgation of the 1980 Rules, EPA confirmed in two authoritative applicability determinations that

the rules incorporate an hourly rate test. In January 1981, Edward Reich, the Director of EPA's Division of Stationary Source Enforcement ("DSSE"), ruled that an increase in hours of operation, even when coupled with a physical change, was not a "modification." Cargill Determination, *supra*. In June 1981, Reich ruled again that a project that would not cause an increase in a unit's hourly rate of emissions did not trigger NSR. GE Determination, *supra*. Mr. Reich "was the head of the division at the EPA responsible for provid[ing] guidance for interpretations which address the implementation of [the NSR] regulations." *Duke Energy*, 278 F. Supp. 2d at 642 (quotation marks omitted) (second alteration in original). He thus spoke for the Agency when he issued these determinations.

Nor was Mr. Reich the only EPA representative to confirm that the hourly rate test controlled. In July 1982, the Chief of the Air Management Branch in EPA Region 4 issued a guidance memorandum stating that a project that did not cause an "increase in . . . hourly particulate emissions" could not trigger NSR. Mem. from James T. Wilburn to State & Local Agency Directors 3 (Jul. 12, 1982) (Appellants' Supp. App. 285). In question-and-answer format, this guidance memorandum hypothesized a physical change that would allow a source to increase its hours of operation nearly 100%, with "no increase in the hourly particulate emissions." *Id.* Asked whether this would "be judged a significant increase in particulate emissions, and cause the source to be subject to PSD for particulate," EPA responded: "No." *Id.* According to EPA, "[s]ince the modification does not cause any increase in emissions, no increase in annual emissions should be calculated." *Id.* (emphasis omitted).

Agency interpretations issued shortly after regulations are promulgated are the best evidence of the regulations' true meaning and intent. See, *e.g.*, *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994); see also *Davis* v. *United States*, 495 U.S. 472, 484 (1990) (contemporaneous statutory

interpretation). The lower courts were therefore wrong simply to sweep these statements aside as "not authoritative" (as the district court did, App. 20a), or to ignore them altogether (as did the court of appeals).[7]

C. Congress Defined "Modification" Under NSR As It Was Defined Under NSPS And Regulatory PSD—Limiting EPA's Interpretive Discretion.

Even if EPA has some discretion to interpret its 1980 Rules in various ways, it may not adopt an interpretation that violates the CAA. And the CAA does not grant EPA discretion to interpret the scope of the term "modification" under NSR to expand the program's applicability to existing sources.

Instead, by defining NSR "modification" as that term is "defined" and "used" in NSPS, Congress invoked a well-established concept. See 42 U.S.C. §§ 7479(2)(C), 7501(4). Before NSR, Congress had applied NSPS to newly constructed emissions units and to "modifications" to existing units. *Id.* § 7411(a)(2), (4). And, by 1977 EPA had clarified the "modification" concept through extensive regulation. Indeed, in 1974 EPA proposed and in 1975 it promulgated a regulation specifically stating that the "emissions increase" required for an NSPS "modification" is an increase in a unit's hourly emissions rate. See 40 C.F.R. § 60.14(a)-(b).[8]

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[7] To the extent the decisions below reflect deference to EPA's litigating position, such deference is inappropriate. Agency interpretations that emerge in litigation, change without rational explanation, or vacillate between positions—as EPA's have here—receive little-to-no deference. *See, e.g., United States* v. *Mead Corp.*, 533 U.S. 218, 233-34 (2001); *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988). Moreover, the inconsistency between EPA's litigating position and its original position provides strong grounds for denying deference here. *See Gonzales* v. *Oregon*, 126 S. Ct. 904, 916 (2006).

[8] EPA adopted the hourly rate test because it properly confines NSPS "modifications" to the "new sources" of emissions that Congress authorized EPA to regulate. 39 Fed. Reg. 36,946, 36,946-47 (Oct. 15, 1974). As EPA later explained, the hourly emissions rate test "eliminates the bur-

Thus, by incorporating the NSPS definition of "modification" into NSR, Congress ensured that an NSR "modification" occurs only if a physical change will increase a unit's actual emissions capacity. In addition, Congress largely based NSR on another program that existed at the time the 1977 Amendments were enacted—known as "regulatory PSD"—which defined "modification" in the same way. See 39 Fed. Reg. 42,510, 42,513 (Dec. 5, 1974).

The Seventh Circuit was therefore wrong to conclude that the term "modification" was "'employed in different parts of the act with different intent,'" App. 7a (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)), and that it imposed no limit on EPA's discretion to interpret the regulations. Congress plainly cross-referenced between NSR and NSPS with the intention of requiring consistency between the two programs. See *Sullivan*, 496 U.S. at 484; *IBP, Inc.* v. *Alvarez*, 126 S. Ct. 514, 523 (2005).[9]

By contrast, nothing suggests that Congress intended or expected NSR to apply to a far broader category of existing sources than NSPS did. The district court acknowledged Congress's silence, but interpreted it as a failure to "limit the EPA's authority to further define 'modification' . . . as it

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den of projecting future emissions and distinguishing between emissions increases caused by the change from those due solely to demand growth, because any increase in the emissions under the maximum achievable emissions test would logically be attributed to the change," while emissions increases due to other factors would not. 70 Fed. Reg. at 61,094.

[9] It is immaterial for the purpose of this case whether Congress's cross-reference denotes an intent to require EPA to interpret "modification" in the same fashion under NSPS and NSR, *see Duke Energy*, 411 F.3d at 550-51, or whether Congress intended to codify the NSPS regulations that were in effect at the time. *See Bragdon* v. *Abbott*, 524 U.S. 624, 631 (1998). Congress was clearly "aware, before it enacted the 1977 Amendments, that [EPA] calculated emissions increases in terms of kg/hr to determine whether a project resulted in a 'modification,'" 70 Fed. Reg. at 61,100, and the NSPS definition of "modification" has not changed in any material respect since it was adopted in 1971 and clarified in 1974.

deemed fit." App. 16a. This analysis is exactly backwards. Courts do not presume that Congress authorizes weighty or wide-ranging changes through statutory language that suggests stability. See, *e.g.*, *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion"); *Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[I]f Congress had such an intent, [it] would have made it explicit in the statute . . . ."). Moreover, here Congress consistently expressed its intention *not* to impose the cost of retrofitting new NSR controls on existing units that simply maintain their existing capabilities. See, *e.g.*, H.R. Rep. No. 95-294, at 185 (1977).

"[I]t tests the limits of reason to suggest that despite such silence, Members of Congress voting for those amendments intended to enact what would arguably be the single most significant change in" the application of the CAA emissions control requirements to existing sources. *Department of Commerce* v. *U.S. House of Representatives*, 525 U.S. 316, 343 (1999) (opinion of O'Connor, J.). The lower courts' statutory interpretation was simply wrong.

D. The CAA's Jurisdictional Provisions Did Not Limit The Seventh Circuit's Review Of EPA's Enforcement Interpretation.

As the Fourth Circuit correctly held, § 307(b) does not divest the courts of jurisdiction to review EPA's enforcement interpretation. The statute states that "[a]ction[s] of the Administrator with respect to which review could have been obtained" by filing a "petition for review" in the D.C. Circuit within 60 days of the publication of those actions "in the Federal Register" are not reviewable in later enforcement proceedings. 42 U.S.C. § 7607(b)(1)-(2).

Cinergy is not challenging the 1980 Rules; it is challenging EPA's interpretation announced in this very enforcement ini-

tiative. Moreover, Cinergy could not have raised its challenge in 1980, because EPA did not interpret the rules then as it does now. To hold that Cinergy cannot raise all of its arguments here—as the Seventh Circuit apparently did—is to hold that Cinergy can never make these arguments. This is contrary to § 307(b) and to basic concepts of fairness.

CONCLUSION

For the foregoing reasons, this Petition should be held for *Environmental Defense* v. *Duke Energy Corp.* (No. 05-848). If the Court affirms the Fourth Circuit's decision, it should vacate the Seventh Circuit's decision and remand for further proceedings. If, however, the Court does not reach the questions presented in No. 05-848, it should grant this Petition.

Respectfully submitted,

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December 15, 2006

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 06-1224

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
and
STATE OF NEW YORK, *et al.*,
Plaintiffs-Intervenors/Appellees,
v.
CINERGY CORPORATION, *et al.*,
Defendants-Appellants.

Argued June 2, 2006
Decided Aug. 17, 2006

Before POSNER, EASTERBROOK, and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*.

The Environmental Protection Agency sued the owner of a number of coal-fired electric power plants claiming that the owner (Cinergy) had violated section 165(a) of the Clean Air Act, 42 U.S.C. § 7475(a), by physically modifying the plants without first obtaining from the EPA a permit that the agency contends is required by EPA regulation 40 C.F.R. § 52.21 for the type of modification that Cinergy made. (Other regulations are applicable to some of Cinergy's facilities but are materially identical to section 52.21, see *New York v. EPA*, 413 F.3d 3, 13 (D.C.Cir.2005) (per curiam), and so needn't be discussed separately.) The EPA contends that the modifi-

cations produced increases in the nitrogen oxides and sulfur dioxide annually emitted by the plants. If the EPA prevails in the suit, Cinergy will be required to retrofit the plants with costly pollution-control equipment ("best available control technology"). § 52.21(j)(3).

Cinergy argues that the regulation does not require a permit for modifications that do not increase the *hourly* rate at which a plant emits pollutants, even if the modifications increase the *annual* rate. The EPA argues that Cinergy is misreading the regulation. The district judge agreed with the EPA but authorized Cinergy to take an interlocutory appeal from his ruling, and we have consented to take the appeal. 28 U.S.C. § 1292(b).

The validity of the regulation is not in issue, just its meaning. Only the U.S. Court of Appeals for the District of Columbia Circuit has jurisdiction to review the validity of nationally applicable regulations issued pursuant to the Clean Air Act, 42 U.S.C. § 7607(b)(1); *Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901, 914 n. 6 (7th Cir.1990); *Natural Resources Defense Council, Inc. v. EPA*, 194 F.3d 130, 135 (D.C.Cir.1999), and 40 C.F.R. § 52.21 is such a regulation.

It requires a permit for any "major modification," defined as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the [Clean Air] Act." § 52.21(b)(2)(i). (All our quotations are from the regulation as it read before revisions in 2002 that are inapplicable to this proceeding and, if applicable, would not affect our analysis.) "Physical change" excludes among other things "routine maintenance, repair and replacement," which Cinergy concedes its plant modifications were not. But it also excludes "an increase in the hours of operation or in the production rate." §§ 52.21(b)(2)(iii)(a), (*f*). That is, merely running the plant closer to its maximum capacity is not a major modification

because it does not involve either a physical change or a change in the *method* of operation. If, however, a physical change enables the plant to increase its output, then, according to the EPA's interpretation, the exclusion for merely operating the plant for longer hours is inapplicable.

"Net emissions increase" is defined, so far as bears on this case, as "any increase in actual emissions from a particular physical change or change in method of operation." § (b)(3)(i)(*a*). A "significant" net emissions increase is measured by the "rate of emissions that would equal or exceed" specified numbers of "tons per year" of the various pollutants. § (b)(23)(i). "Actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period. . . . Actual admissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period." § (b)(21)(ii).

Since both the base emissions rate from which a significant increase is calculated, and the amount of the increase, are in terms of tons per year rather than per hour, the natural reading of the regulation is that any physical change or change in operating methods that increases annual emissions is covered. Cinergy argues that calculating "actual emissions . . . using . . . actual operating hours," § (b)(21)(ii), "means that an 'emissions increase' is found only if the hourly rate of emissions increases as a result of physical change." But "actual operating hours" is more naturally read to mean the total number of hours that the plant is in operation. Suppose that before some physical change the plant operated an average of 18 hours a day, and the change enabled it to operate 24 hours a day. Since the regulation is concerned with the "increase in *actual* emissions" rather than with a *potential* increase in emissions, § 52.21(b)(21)(v); *Wisconsin Electric Power Co. v. Reilly*, *supra*, 893 F.2d. at 916; *New*

York v. EPA, *supra*, 413 F.3d at 15, the plant could not *automatically* be assumed to operate 24 hours a day after the modification was made—there might not be enough demand to justify such continuous operation. But suppose a reasonable estimate was that the plant would operate an average of 20 hours a day with the modification; then, as a first approximation, a reasonable estimate of the contribution of the modification to pollution would be that the modification had increased the plant's annual emissions by about 10 percent. This estimate would determine whether the company needed a permit for the modification.

Cinergy's suggested interpretation, besides not conforming well to the language of the regulation, would if adopted give a company that had a choice between making a physical modification that increased the hourly emissions rate and one that enabled an increase in the number of hours of operation an incentive to make the latter change even if that would produce a higher annual level of emissions, because it would elude the permit requirement.

Cinergy's interpretation would also distort the choice between rebuilding an old plant and replacing it with a new one. The Clean Air Act treats old plants more leniently than new ones because of the expense of retrofitting pollution-control equipment. *Wisconsin Electric Power Co. v. Reilly*, *supra*, 893 F.2d at 909-10. But there is an expectation that old plants will wear out and be replaced by new ones that will be subject to the more stringent pollution controls that the Clean Air Act imposes on new plants. One thing that stimulates replacement of an old plant is that aging produces more frequent breakdowns and so reduces a plant's hours of operation and hence its output. Cinergy's interpretation would give the company an artificial incentive to renovate a plant and by so doing increase the plant's hours of operation, rather than to replace the plant. For by going the first route

it could increase the plant's output without having to invest in preventing the enhanced output from generating increased pollution.

The fact that the EPA's interpretation avoids some bad consequences doesn't prove that it's correct. But it does scotch the argument that the interpretation produces such outlandish consequences that it must be incorrect—which is not to say that Cinergy's interpretation must be incorrect because *it* would produce outlandish results. It would not, as suggested by the EPA's having put out for comment a proposal to change the regulation to the hourly-emissions standard favored by Cinergy. See *Prevention of New Source Deterioration, Nonattainment New Source Review, and New Source Performance Standards: Emissions Test for Electric Generating Units*, 70 Fed.Reg. 61081 (Oct. 20, 2005). Under the existing regulation as interpreted by the EPA, Cinergy, rather than having to choose between repair and replacement to enhance output, might decide to buy electricity from other electric utilities, and their plants might pollute more than Cinergy's do. And while Cinergy can determine a plant's hourly rate of emissions easily enough just by observing the plant in operation, it cannot predict the plant's annual emissions rate because that depends on the number of hours of operation; and who knows in advance how many hours a plant will operate? Of course the company can always curtail those hours if it sees itself approaching the ceiling. But that might complicate its customer relations, as well as sacrificing significant revenue. True, what is required for determining whether a construction permit must be sought for a planned physical change in the plant is not prescience, but merely a reasonable estimate of the amount of additional emissions that the change will cause; yet it may be a very difficult estimate to make.

Cinergy's principal argument, however, has nothing to do with the consequences of the alternative interpretations; it is

that Congress required that the regulation define "modification" as a change in the hourly emissions rate. Since the regulation does not define it so, this seems an attack on the validity of the regulation rather than an argument about its meaning, and issues of validity, we pointed out, are beyond the jurisdiction of a regional circuit to resolve. In any event, the argument is unconvincing.

The Clean Air Act, as amended in 1970, required the EPA to devise "New Source Performance Standards" (NSPS), including standards for "modifications," defined as physical changes, or changes in operating methods, that increased the amount of pollutants emitted. 42 U.S.C. § 7411(a)(4). One of the standards that the agency adopted placed hourly limits on emissions from coal-fired electric power plants. After further amending the Act in 1977 to require the EPA to take steps to prevent significant deterioration (PSD) in air quality—it is pursuant to these amendments that the regulation at issue in this case was promulgated, see 42 U.S.C. § 7477—Congress amended the amendments to provide that "modifications" would bear the same meaning in the PSD provisions as the word bore in the NSPS provisions. § 7479(2)(C); *Wisconsin Electric Power Co. v. Reilly, supra*, 893 F.2d at 905; *New York v. EPA, supra*, 413 F.3d at 13. But the statutory definition of "modifications" to which Congress was referring says nothing about hourly versus annual emissions. § 7411(a)(4). The hourly-emission standard under the New Source Performance Standards is a creature of regulation, 40 C.F.R. §§ 60.14(a)-(b), and the "same meaning" statutory amendment does not purport to incorporate the agency's regulatory definition of modifications under the New Source Performance Standards into the provisions relating to the Prevention of Significant Deterioration program.

Cinergy's argument was rejected by the D.C. Circuit in *New York v. EPA, supra*, which upheld the EPA's interpretation of the regulation. But it was accepted by the Fourth

Circuit in *United States v. Duke Energy Corp.*, 411 F.3d 539, 546-51 (4th Cir.2005), cert. granted, ___ U.S. ___, 126 S.Ct. 2019, 164 L.Ed.2d 778 (2006), creating a circuit conflict that the Supreme Court presumably granted certiorari in the *Duke Energy* case to resolve.

In so ruling, the Fourth Circuit stepped out of bounds, as we have said in describing Cinergy's argument. But in any event the argument's premise is incorrect. The same word can mean different things in the same statute. See *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 595-96, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 342-44, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997); *Indianapolis Life Insurance Co. v. United States*, 115 F.3d 430, 434-35 (7th Cir.1997), and with specific reference to the Clean Air Act *Potomac Electric Power Co. v. EPA*, 650 F.2d 509, 518 (4th Cir.1981); *Northern Plains Resource Council v. EPA*, 645 F.2d 1349, 1355-56 (9th Cir.1981). "There is a natural presumption that identical words used in different parts of the same act are intended to have the same meaning. But the presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S.Ct. 607, 76 L.Ed. 1204 (1932).

Because many words have multiple meanings, the same word might well be used in one sense in one part of a statute and another sense in another. That is certainly the case with a vague word like "modification," and all the more when the statutory provisions that contain the word were enacted by different Congresses for different purposes. *United States ex rel. Long v. SCS Business & Technical Institute, Inc.*, 173 F.3d 870, 881 n. 15 (D.C.Cir.1999). The New Source Performance Standards part of the Act, the older part, imposes

specific technical requirements on polluters, and it is natural therefore that "modification" in that part of the Act should refer to physical changes in the plant. The Prevention of Significant Deterioration part of the Act leans toward the more modern approach of limiting output (pollution) rather than inputs (technology), and so it is equally natural to interpret "modification" in that part more broadly in order to prevent opening a loophole that would allow pollution to soar unregulated. See *Potomac Electric Power Co. v. EPA, supra*, 650 F.2d at 518; *Alabama Power Co. v. Costle*, 636 F.2d 323, 402 (D.C.Cir.1980) (per curiam).

Furthermore, a vague statutory term in a regulatory statute can operate as a delegation to the regulatory agency to supply meaning. *Washington State Dept. of Social & Health Services v. Guardianship Estate of Danny Keffeler*, 537 U.S. 371, 389-90, 123 S.Ct. 1017, 154 L.Ed.2d 972 (2003); *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 739, 116 S.Ct. 1730, 135 L.Ed.2d 25 (1996); *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-46, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). The New Source Performance Standards and Prevention of Significant Deterioration provisions of the Clean Air Act are at one in defining a modification as a physical change in a plant that results in an increase in emissions, but are silent on whether the increase is in the hourly rate of emissions or in some other rate. The task of deciding was left to the EPA. There was nothing to require that it flesh out the vague statutory meaning in the identical way in different parts of the Clean Air Act adopted years apart and reflecting, to an extent anyway, different philosophies of pollution control.

Cinergy's other arguments are makeweights, and we will not extend this opinion to discuss them.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
S.D. INDIANA,
INDIANAPOLIS DIVISION

No. 199CV01693LJMVSS

UNITED STATES OF AMERICA,
Plaintiff,

STATE OF NEW YORK, STATE OF CONNECTICUT,
STATE OF NEW JERSEY,
Plaintiff-Intervenors,

HOOSIER ENVIRONMENTAL COUNCIL,
OHIO ENVIRONMENT COUNCIL,
Third-Party Plaintiffs,

v.

CINERGY CORPORATION; PSI ENERGY, INC.;
CINCINNATI GAS & ELECTRIC CO.,
Defendants.

Aug. 29, 2005
As Amended Sept. 8, 2005

ORDER ON CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT REGARDING THE APPLICABLE TEST FOR EMISSIONS INCREASES

MCKINNEY, Chief Judge.

This matter is before the Court on the parties' request for the Court to decide the purely legal question of what test applies to determine whether an emissions increase occurs so as to trigger the Clean Air Act's ("CAA") New Source Review ("NSR") permit provisions. The United States of

America (the "USA") filed a Motion for Partial Summary Judgment on Emissions Test. In response, defendants Cinergy Corporation; PSI Energy, Inc.; and Cincinnati Gas & Electric Co. (collectively, "Cinergy") filed a Motion for Summary Judgment on the Applicable Test for Emission Increases. The parties have fully briefed the issue and it is now ripe for ruling. For the reasons explained herein, the USA's motion is GRANTED, and Cinergy's motion is DENIED.

I. *BACKGROUND*

The USA has brought this action against Cinergy alleging, *inter alia*, that it violated NSR[1] provisions when it made physical changes to its units that were "modifications" without first having obtained a pre-construction permit. The Prevention of Significant Deterioration ("PSD") program requires that: "No major emitting facility on which construction [or modification] is commenced after August 7, 1977, may be constructed [or modified] . . . unless (1) a permit has been issued for such proposed facility in accordance with this part . . . ." 42 U.S.C. § 7475(a). The Nonattainment New Source Review ("NNSR") program requires "permits for the construction or operation of new or modified major stationary sources anywhere in the nonattainment area." *Id.* § 7502(c)(5). Central to this lawsuit, then, is whether the changes Cinergy made to its emitting sources were modifications.

Congress enacted the CAA in 1970, including the New Source Performance Standard ("NSPS") provisions, which directed the Environmental Protection Agency ("EPA") to promulgate technology-based performance standards for new or modified emitting facilities. *Id.* § 7411. The EPA promulgated the regulatory PSD program in 1974, in re-

[1] NSR includes both the Prevention of Significant Deterioration ("PSD") provisions and the Nonattainment New Source Review ("NNSR") provisions.

sponse to litigation over its obligation under the CAA to require states to implement plans to prevent significant deterioration of air quality in areas where minimum standards had been attained. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 347 (D.C.Cir.1979). The "NSPS" regulatory definition of "modification" specifically directed that emission rates be measured in kilograms per hour, 40 C.F.R. § 60.14, but the PSD regulatory definition of "modification" did not. Rather, the PSD regulation defined "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any [regulated] pollutant." 39 Fed.Reg. 42,510, 42,514 (Dec. 5, 1974). In 1977, Congress amended the CAA to include a statutory PSD program, as well as the NNSR program.

When Congress first enacted the statutory PSD program in 1977, the permit provisions applied only to the "construction" of major emitting facilities. *See* Clean Air Act Amendments of 1977, Pub.L. No. 95-95, 91 Stat. 685, 735 (1977). Just a few months later, Congress passed "technical and conforming amendments" to the CAA, which added to the "Definitions" section of the PSD provisions the following: "The term 'construction' when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility." Pub.L. No. 95-190, 91 Stat. 1293, 1402 (1977); *see* 42 U.S.C. § 7479(1)(C). Section 7411(a), part of the NSPS provisions, defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. § 7411. The definition of "modification" in NNSR also refers to section 7411(a). *Id.* § 7501(4).

EPA regulations further define "modification" for NSPS purposes as "any physical or operational change to an exist-

ing facility which results in an increase in the emissions rate to the atmosphere of any [regulated] pollutant . . . expressed as kg/hr." 40 C.F.R. § 60.14(a) & (b). In 1980, after several rule changes that defined "modification" for NSR purposes, the final regulation defined the term "major modification" as "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act." 45 Fed.Reg. 52,676, 52,735 (Aug. 7, 1980); see *New York v. U.S. EPA*, 413 F.3d 3, 12 (D.C.Cir.2005) for discussion of regulation's history.

After it promulgated the 1980 rule, EPA advocated using an "actual-to-potential" test to measure increased emissions for PSD permitting purposes. The actual-to-potential test compared a source's past annual emissions to its potential future annual emissions after the physical change, assuming the source would operate at full capacity in the future. *See Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901, 916-18 (7th Cir.1990). The Seventh Circuit rejected the actual-to-potential test in *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir.1990). Instead, the court agreed with Defendant WEPCO that the EPA should measure future emissions based on a projection of future actual emissions. This has become known as the "actual-to-projected-actual" test.

Following *WEPCO*, Congress amended the CAA in 1990. The 1990 Amendments included some changes related to NSR, but did not address the issue raised in *WEPCO* of the correct way to measure future emissions, and did not revisit the statutory definition of modification. *See New York*, 413 F.3d at 15-16. The EPA subsequently adopted the actual-to-projected-actual test. *See* 40 C.F.R. § 52.21(a)(2)(iv)(c) (2004).

The issue to be decided herein is the purely legal question of what is the appropriate method of determining whether a physical change at a source has caused an increase in

emissions for purposes of NSR. The parties and their experts may then apply this method to the facts of this case in preparation for trial.

II. *STANDARD*

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal procedural rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *see United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir.1990). Summary judgment is granted if the all the evidence shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). An issue is genuine only if the evidence is such that a reasonable jury could return a verdict for the opposing party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A disputed fact is material only if it might affect the outcome of the suit in light of the substantive law. *See id.*

The moving party has the initial burden to show the absence of genuine issues of material fact. *See Wollin v. Gondert*, 192 F.3d 616, 620 (7th Cir.1999); *Schroeder v. Barth, Inc.*, 969 F.2d 421, 423 (7th Cir.1992). This burden does not entail producing evidence to negate claims on which the opposing party has the burden of proof. *See Green v. Whiteco Indus., Inc.*, 17 F.3d 199, 201 & n. 3 (7th Cir.1994). The party opposing a summary judgment motion bears an affirmative burden of presenting evidence that a disputed issue of material fact exists. *See Wollin*, 192 F.3d at 621.

When considering a summary judgment motion, a court must draw all reasonable inferences "in the light most favorable" to the opposing party. *Id.* at 621; *Thomas & Betts*

Corp. v. Panduit Corp., 138 F.3d 277, 291 (7th Cir.1998); *Spraying Sys. Co. v. Delavan, Inc.*, 975 F.2d 387, 392 (7th Cir.1992). If a reasonable fact finder could find for the opposing party, then summary judgment is inappropriate. *Stop-N-Go of Madison, Inc. v. Uno-Ven Co.*, 184 F.3d 672, 677 (7th Cir.1999); *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir.1992). When the standard embraced in Rule 56(c) is met, summary judgment is mandatory. *Celotex Corp.*, 477 U.S. at 322, 106 S.Ct. 2548; *Thomas & Betts Corp.*, 138 F.3d at 291; *Shields Enters., Inc.*, 975 F.2d at 1294.

III. *DISCUSSION*

The appropriate test for measuring emissions under the PSD program has been the subject of numerous judicial opinions over the years, including one from this Court, *United States of America v. Southern Indiana Gas and Electric Co.*, No. IP 99-1692-C-M/F, 2002 WL 1629817 (S.D.Ind. July 18, 2002) ("*SIGECO*"), and from the Seventh Circuit Court of Appeals, *Wisconsin Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir.1990) ("*WEPCO*"). In *SIGECO* this Court held that the PSD program requires an owner or operator to determine whether a preconstruction permit is required *before* construction begins. *SIGECO*, at *3. In *WEPCO* the Seventh Circuit addressed *inter alia*, how to assess emissions increases for PSD purposes. Specifically, the court ruled that the EPA could not assume a unit would operate at its full potential after physical change, but must consider past operating conditions. *WEPCO*, at 917-18.

More recently the District of Columbia and Fourth Circuit Courts of Appeals have issued opinions that bear directly on this issue. In *United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir.2005), the Fourth Circuit Court of Appeals found that once Congress incorporated the statutory definition of "modification" from the NSPS program into the PSD statute, the EPA could not interpret the definitions differently. *Duke*

Energy, 411 F.3d at 546-47. The court looked to the plain language of the CAA to find that because the terms are defined identically, Congress could not have intended contradictory interpretations. *Id.* at 548 (relying on *Rowan Cos. v. United States*, 452 U.S. 247, 101 S.Ct. 2288, 68 L.Ed.2d 814 (1981)). The court also found that the legislative history of the PSD statutes supported the view that Congress intended EPA to use the same definition for both programs. *Id.* (citing 123 Cong. Rec. 36,253 (Nov. 1, 1977) (amending the statute to "conform to usage in other parts of the Act")).

In *New York v. U.S. EPA*, 413 F.3d 3 (D.C.Cir.2005), the District of Columbia Court of Appeals held that nothing in the statutory language or history suggested that in enacting the 1977 CAA Amendments Congress intended to incorporate the NSPS regulatory definition of "modification" into the PSD statute. *New York*, 413 F.3d at 19-20. However, the court purposefully did not address whether Congress intended to require the EPA to provide identical regulatory definitions for "modification" throughout the NSPS and NSR programs. *Id.* at 20.

A. PROJECTED EMISSIONS

The first part of determining the correct emission test is whether the post-project emissions should be determined by a pre-project projection or a post-project measurement. The USA argues that the EPA must estimate post-project emissions before construction begins. Cinergy does not raise this argument in its own cross-motion, but recognizes in its reply memorandum that this Court has previously decided the issue. *See SIGECO*. Thus, in line with the purpose and logical interpretation of the PSD permit requirement, this Court reaffirms that an owner or operator must make a pre-construction projection of whether and how much emissions will increase at a particular unit following construction.

B. EMISSIONS CALCULATION

The second and more complicated issue is whether an owner or operator under the NSR provisions must calculate an "increase[in] the amount of any air pollutant emitted" by a source based on an hourly or yearly emissions rate. *See* 42 U.S.C. § 7411. This Court previously has adopted the view that the PSD permit provisions apply when there will be an increase in the total annual emissions. *See United States v. Southern Ind. Gas & Elec. Co.*, 245 F.Supp.2d 994, 998 (S.D.Ind.2003).

1. *Congressional Language and Intent*

The parties' most formidable dispute is about how Congress intended the EPA to make the calculation. This Court begins by following the line of analysis the District of Columbia Circuit used in *New York*. When Congress altered the definition of "construction" to include "modification" under PSD as it is used for NSPS, it did not, expressly or otherwise, incorporate the regulatory definition. *See New York*, 413 F.3d at 19-20. Nothing in the Congressional history indicates Congress intended to incorporate the regulatory definition. *See id.* By contrast, Congress did expressly incorporate regulatory provisions in other areas of the CAA. *See id.* at 19 (citing Pub.L. No. 95-95, § 129(a)(1), 91 Stat. 685, 745 (1977)).

Further, Congress did not limit the EPA's authority to further define "modification" in the regulations as it deemed fit to serve the purposes of the PSD program. *See, e.g., Alabama Power*, 636 F.2d at 397-98 (recognizing that the EPA had the authority to adopt different regulatory definitions for "source" in NSR and NSPS in light of the "differences in the purpose and structure of the two programs"). Nor did Congress direct the EPA to change its regulatory definition, which differed from the NSPS regulatory definition at the time Congress promulgated NSR in

1977. *See, e.g.*, 39 Fed.Reg. 42,510, 42,514 (Dec. 5, 1974). Finally, nothing about the EPA's definition of "modification" contradicts the statutory definition.

2. *EPA's Language and Intent*

Next, the Court must address Cinergy's argument that the EPA's own rules require it to hold the hours of operation and production rates constant when determining whether a net emissions increase will occur. Cinergy first argues that EPA's current litigation position is contrary to its own earlier acknowledgments that Congress intended for the EPA to conform the meaning and usage of "modification" in PSD to that in NSPS. Second, Cinergy argues that EPA's current litigation position is contrary to its own rules.

a. Prior Construction

The Court rejects Cinergy's argument that the EPA's current litigation position is contrary to earlier acknowledgments that Congress intended for the EPA to define "modification" for NSR as it does for NSPS. Cinergy has mistaken the circumstances surrounding some of these "acknowledgments." For example, when the EPA stated in 1984 that Congress intended the NSPS statute to also apply to EPA regulations implementing section 111(a)(4), the EPA was referring to the inclusion of "fugitive emissions" in the concept of overall emissions. *See* 49 Fed.Reg. 43, 211, 43,213 (Oct. 26, 1984). When the EPA stated in 2003 that "We have understood [Congress' statements] to be a reference to our preexisting rules interpreting the term 'modification' in the NSPS context" it was a reference to what is excluded from "modification," specifically, the routine maintenance, repair and replacement exception. 68 Fed.Reg. 61248, 61269 (Oct. 27, 2003). Later in that same rulemaking, the EPA reiterated that it takes the same general approach to what constitutes an increase in emissions for

NSPS and NSR, *except* that the NSR rule uses an *annual* measurement. *Id.*

The 1980 rule defines "major modification" as a change that causes a significant net increase in a unit's "actual emissions." *See* 45 Fed.Reg. 52,676, 52,698 (Aug. 7, 1980). "Actual emissions" are to be measured using the unit's actual operating hours and production rates. 40 C.F.R. § 52.21(b)(21)(ii). The Court disagrees with both Cinergy and the *Duke Energy* court that the EPA's definition of "actual emissions," means that " a net emissions increase can result only from an increase in the hourly rate of emissions." *See Duke Energy*, 278 F.Supp.2d at 640. Consistent with the 1980 rule defining "actual emission," in an actual-to-projected-actual comparison, the projected actual emissions would be measured using projected actual operating hours and projected actual production rates. Thus, if a physical change will result in a unit increasing its operating hours, the projected actual operating hours would include the increase.

Cinergy argues that the *WEPCO* decision and the EPA's own interpretation of the 1980 rules compels that a net emissions increase under NSR must be measured holding hours of operation and production rates constant. This Court reads *WEPCO* only to have rejected the actual-to-potential comparison and EPA's assumption in that case of continuous operations. *See WEPCO*, 893 F.2d at 917. Instead, the Seventh Circuit thought " 'a more realistic assessment of [a source's] impact on ambient air quality levels is possible.' " *Id.* (quoting *Alabama Power*, 636 F.2d at 379). The issue in that case was not the same issue this Court must address; the issue was simply whether the actual-to-potential comparison was appropriate. Nothing in the *WEPCO* decision directed EPA to ignore the impact a physical change would have on the actual future operating hours of a unit. The Seventh Circuit in *WEPCO* recognized that for NSPS purposes, the EPA would determine whether a source's hourly rate in-

creased and that for PSD purposes, the EPA would determine whether a source's total amount of emissions would increase. *See id.* at 905.

b. Increased Hours Exclusion

Cinergy fears that allowing the EPA to interpret "modification" this way for NSR will eliminate a causation element. Cinergy argues that the EPA would not be able to discern when an increase in emissions was caused by a "modification" rather than another factor, such as demand. Cinergy's fear is unfounded. The definition of "modification" in NSR and NSPS has several exceptions, including routine maintenance, repair and replacement, as well as an increase in hours or emissions not tied to a physical change. *See* 40 C.F.R. § 52.21(b)(2).

The PSD regulations state that an increase in hours or production rate are not considered physical changes. *Id.* § 52.21(b)(2)(iii)(f). A reference back to the definition of "major modification" demonstrates that it is a physical change that results in an emissions increase. *Id.* § 52.21(b)(i). Thus, the plain meaning of the increased hours exclusion is that an increase in hours or production rate are not a "physical change" and thus cannot, alone, be a modification. Increased hours and production rate are not excluded from the definition of "modification"; that is, if a physical change results in an increase in hours of operation that causes a net emissions increase, a modification has occurred. Not only is this the plain and most logical reading of the regulation, it prevents the very situation about which Cinergy is concerned—that in which an increase in hours or production rate *unrelated to any physical change* would be considered a modification and subject the source to PSD review. The EPA

confirmed this view by way of the "Clay Memorandum" issued on September 9, 1988.[2]

Cinergy argues that two statements Edward Reich, then-Director of EPA's Division of Stationary Source Enforcement, made in 1981 (the "Reich Memos") indicate otherwise, and also that the Reich Memos demonstrate an EPA interpretation that is contrary to its current litigation position. This Court agrees with the Southern District of Ohio's view that the Reich Memos are contrary to the plain language of the CAA and EPA's regulations. *See United States v. Ohio Edison Co.*, 276 F.Supp.2d 829, 877 (S.D.Ohio.2003). The Reich Memos are not authoritative here.

IV. *CONCLUSION*

For all of the reasons set forth above, the USA's motion for summary judgment is GRANTED and Cinergy's motion for summary judgment is DENIED.

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[2] "The preamble to the rule (45 FR 52676, 52704 (August 7, 1980)), makes it clear that this exclusion is intended to allow a company to lawfully increase emissions through a simple change in hours or rate of operation up to its potential to emit . . . without having to obtain a PSD permit. . . . However, . . . the exclusion for increases in hours of operation or production rate does not take the project beyond the reach of PSD coverage if those increases to [sic] not stand alone but rather are associated with non-excluded physical or operational changes." Clay Memorandum at 6-7.

APPENDIX C

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

No. 05-8029

In re: CINERGY CORPORATION, CINERGY SERVICES, INCORPORATED, PSI ENERGY, INCORPORATED, *et al.*,
Petitioners.

Petition for Permission to Appeal Pursuant to 28 U.S.C. § 1292(b) Southern District of Indiana, Indianapolis Division
Larry J. McKinney, *Chief Judge.*

January 3, 2006

Before

Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DIANE P. WOOD, *Circuit Judge*

The following are before the court:

1. DEFENDANTS/PETITIONERS CINERGY CORP., CINERGY SERVICES, INC., PSI ENERGY, AND CINCINNATI GAS & ELECTRIC COMPANY'S PETITION FOR PERMISSION TO APPEAL, filed on October 18, 2005, by counsel for the petitioners.

2. UNITED STATES' RESPONSE TO PETITION FOR PERMISSION TO APPEAL, filed on November 3, 2005, by counsel for respondent United States of America.

3. RESPONSE OF PLAINTIFF-INTERVENOR/RESPONDENT STATES AND ENVIRONMENTAL GROUPS TO DEFENDANT/PETITIONERS' PETITION FOR PERMISSION TO APPEAL, filed on November 3, 2005, by counsel for respondents State of New York, State of New Jersey, State of Connecticut, and Hoosier Environmental. Council.

IT IS ORDERED that #1 is GRANTED. The petitioners shall pay the required appellate fees to the clerk of the district court within 10 days from the entry of this order pursuant to Federal Rule of Appellate Procedure 5(d)(1). Once the district court notifies this court that the fees have been paid, the appeal will be entered on this court's general docket.

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

1:99-cv-1693-LJM-VSS

UNITED STATES OF AMERICA,
Plaintiffs,

STATE OF NEW YORK, STATE OF NEW JERSEY, STATE OF CONNECTICUT, HOOSIER ENVIRONMENTAL COUNCIL,
Plaintiff-Intervenors,

vs.

CINERGY CORP., PSI ENERGY, INC., and THE CINCINNATI GAS & ELECTRIC COMPANY,
Defendants.

ORDER ON DEFENDANTS' MOTION TO CERTIFY

This matter is before the Court on the motion of the defendants, Cinergy Corp., PSI Energy, Inc., and The Cincinnati Gas & Electric Company (collectively "Cinergy"), for the Court to amend its order of September 8, 2005 (the "Order"), pursuant to 28 U.S.C. § 1292(b) and Rule 5(a)(3) of the Federal Rules of Appellate Procedure, to permit interlocutory appeal. The Court hereby *GRANTS* Cinergy's motion.

The current motion follows this Court's resolution of whether, under the Clean Air Act (the "Act") and the Act's New Source Review ("NSR") permit provisions, a source modification occurs only when the hourly emissions increase, or when the yearly emissions increase as a result of increased hours of productions. *See* 42 U.S.C. 7475(a). Cinergy had argued that an emissions increase that constitutes a modi-

fication under the Act can occur only if the hourly rate of emissions increased. In the Order, this Court ruled that "if a physical change results in an increase in hours of operation that causes a net emissions increase, a modification has occurred." Cinergy now seeks to immediately appeal the Order.

The Court will certify an order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) if the Court is of the opinion that "(1) the appeal presents a question of law; (2) it is controlling; (3) it is contestable; (4) its resolution will expedite the resolution of the litigation, and (5) the petition to appeal is filed in the district court within a reasonable amount of time after entry of the order sought to be appealed." *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1007 (7th Cir. 2002).

The Order addressed a purely legal issue of interpreting the Act. The resolution of that issue controls how the parties must calculate emissions increases to determine the facts of this case for trial. Whether Cinergy violated NSR permitting provisions is central to this litigation. Cinergy's position was not without support, as the Court noted in the Order; thus, the issue is reasonably contested. A Seventh Circuit Court of Appeals ruling will aid these parties, as well as other similarly-situated litigants. The Court also believes an appellate ruling on the issue will expedite the resolution of this case. Once the parties make final emissions calculations, it may be possible for the parties to stipulate some facts, leading to settlement or judgment on some claims without a trial. Finally, Cinergy filed the present motion within two days of the Order, which this Court finds is a reasonable period of time.

Thus, Cinergy's motion is *GRANTED*. The Court hereby certifies as appealable its Order of September 8, 2005.

IT IS SO ORDERED this 4th day of October, 2005.

/s/ Larry J. McKinney
LARRY J. MCKINNEY, Chief Judge
United States District Court
Southern District of Indiana

Distribution attached.

APPENDIX E

STATUTES

42 U.S.C. § 7411. Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

* * * *

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

* * * *

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

* * * *

42 U.S.C. § 7475. Preconstruction requirements

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

> (1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is

having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

* * * *

42 U.S.C. § 7479. Definitions

For purposes of this part—

(1) The term "major emitting facility" means any of the following stationary sources of air pollutants which emit, or have the potential to emit, one hundred tons per year or more of any air pollutant from the following types of stationary sources: fossil-fuel fired steam electric plants of more than two hundred and fifty million British thermal units per hour heat input, coal cleaning plants (thermal dryers), kraft pulp mills, Portland Cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than fifty tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three

hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes

and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to November 15, 1990.

* * * *

42 U.S.C. § 7501. Definitions

For the purpose of this part—

* * * *

(4) Modifications; modified

The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

42 U.S.C. § 7607. Administrative proceedings and judicial review

* * * *

(b) Judicial review

(1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under

section 7521(b)(1) of this title), any determination under section 7521(b)(5) of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia. A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 7410 of this title or section 7411(d) of this title, any order under section 7411(j) of this title, under section 7412 of this title,,[2] under section 7419 of this title, or under section 7420 of this title, or his action under section 1857c-10(c)(2)(A), (B), or (C) of this title (as in effect before August 7, 1977) or under regulations thereunder, or revising regulations for enhanced monitoring and compliance certification programs under section 7414(a)(3) of this title, or any other final action of the Administrator under this chapter (including any denial or disapproval by the Administrator under subchapter I of this chapter) which is locally or regionally applicable may be filed only in the United States Court of Appeals for the appropriate circuit. Notwithstanding the preceding sentence a petition for review of any action referred to in such sentence may be filed only in the United States Court of Appeals for the District of Columbia if such action is based on a determination of nationwide scope or effect and if in taking such action the Administrator finds and publishes that such action is based on such a determination. Any petition for review under this subsection shall be filed within sixty days from the date notice of such promulgation, approval, or action appears in the Federal

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[2] So in original.

Register, except that if such petition is based solely on grounds arising after such sixtieth day, then any petition for review under this subsection shall be filed within sixty days after such grounds arise. The filing of a petition for reconsideration by the Administrator of any otherwise final rule or action shall not affect the finality of such rule or action for purposes of judicial review nor extend the time within which a petition for judicial review of such rule or action under this section may be filed, and shall not postpone the effectiveness of such rule or action.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) shall not be subject to judicial review in civil or criminal proceedings for enforcement. Where a final decision by the Administrator defers performance of any nondiscretionary statutory action to a later time, any person may challenge the deferral pursuant to paragraph (1).

APPENDIX F

1987 CODE OF FEDERAL REGULATIONS

40 C.F.R. § 51.100 Definitions.

As used in this part, all terms not defined herein will have the meaning given them in the Act:

(a) "Act" means the Clean Air Act (42 U.S.C. 7401 et seq., as amended by Pub. L. 91-604, 84 Stat. 1676 Pub. L. 95-95, 91 Stat., 685 and Pub. L. 95-190, 91 Stat., 1399.)

* * * *

40 C.F.R. § 52.01 Definitions.

All terms used in this part but not defined herein shall have the meaning given them in the Clean Air Act and in Parts 51 and 60 of this chapter.

* * * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(d)(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(d)(2) The following shall not be considered a change in the method of operation:

(d)(2)(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(d)(2)(ii) An increase in the hours of operation;

(d)(2)(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this part which imposes

conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * * *

40 C.F.R. § 52.21 Prevention of significant deterioration of air quality.

* * * *

(b) Definitions For the purposes of this section:

* * * *

(b)(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(b)(2)(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(b)(2)(iii) A physical change or change in the method of operation shall not include:

(b)(2)(iii)(a) Routine maintenance, repair and replacement;

(b)(2)(iii)(b) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plant pursuant to the Federal Power Act;

(b)(2)(iii)(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(b)(2)(iii)(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(b)(2)(iii)(e) Use of an alternative fuel or raw material by a stationary source which:

(b)(2)(iii)(e)(1) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166; or

(b)(2)(iii)(e)(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.166;

(b)(2)(iii)(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Subpart I or 40 CFR 51.166.

(b)(2)(iii)(g) Any change in ownership at a stationary source.

(b)(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(b)(3)(i)(a) Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source; and

(b)(3)(i)(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(b)(3)(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(b)(3)(ii)(a) The date five years before construction on the particular change commences; and

(b)(3)(ii)(b) The date that the increase from the particular change occurs.

(b)(3)(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in

issuing a permit for the source under this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(b)(3)(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(b)(3)(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(b)(3)(vi) A decrease in actual emissions is creditable only to the extent that:

(b)(3)(vi)(a) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(b)(3)(vi)(b) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(b)(3)(vi)(c) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(b)(3)(vii) [Reserved]

(b)(3)(viii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

* * * *

(b)(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

* * * *

(b)(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with paragraphs (b)(21)(ii)-(b)(21)(iv)(iv) of this section.

(b)(21)(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(b)(21)(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(b)(21)(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

* * * *

(i) Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions

(1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Administrator has authority to issue any such permit.

(2) The requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to

regulation under the Act that it would emit, except as this section otherwise provides.

* * * *

40 C.F.R. § 60.2 Definitions.

* * * *

"Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility or which results in the emission of any air pollutant (to which a standard applies) into the atmosphere not previously emitted.

* * * *

40 C.F.R. § 60.14 Modification.

(a) Except as provided under paragraphs (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to determine emission rate:

* * * *

(e) The following shall not, by themselves, be considered modifications under this part:

(c)(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(c)(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on that facility.

(c)(3) An increase in the hours of operation.

(c)(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction specifications as amended prior to the change. Conversion to coal required for energy considerations, as specified in section 111(a)(8) of the Act, shall not be considered a modification.

(c)(5) The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emission control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

(c)(6) The relocation or change in ownership of an existing facility.

(f) Special provisions set forth under an applicable subpart of this part shall supersede any conflicting provisions of this section.

(g) Within 180 days of the completion of any physical or operational change subject to the control measures specified in paragraph (a) of this section, compliance with all applicable standards must be achieved.

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SUPREME COURT, U.S.

No. 06-850

In the Supreme Court of the United States

CINERGY CORPORATION, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Environmental Protection Agency (EPA) reasonably construed its regulations defining the statutory term "modification" for purposes of the New Source Review (NSR) program to measure emissions increases based on total annual emissions.

2. Whether the courts have jurisdiction in this civil enforcement action to adjudicate petitioners' contention that the Clean Air Act (CAA) requires EPA to interpret its NSR regulations to measure emissions increases based solely on increases in the hourly emissions rate.

3. Whether the CAA requires EPA to measure emissions increases for purposes of the NSR program the same way it has historically calculated them for purposes of the New Source Performance Standards program.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 458 F.3d 705. The opinion of the district court (Pet. App. 9a-20a) is reported at 384 F. Supp. 2d 1272.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 2006. On November 6, 2006, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including December 15, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In this civil enforcement action, the United States alleged that petitioners Cinergy Corp., Cinergy Ser-

vices, Inc., PSI Energy, Inc., and Cincinnati Gas & Electric Co. failed to comply with the New Source Review (NSR) requirements of the Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, when they undertook massive construction projects to refurbish coal-fired power plants in Indiana and Ohio. The district court upheld the Environmental Protection Agency's (EPA's) interpretation of its own regulations as requiring that emissions increases be calculated on an actual, annual basis for purposes of determining whether a project is a "modification" subject to NSR. On interlocutory appeal, the court of appeals affirmed.

1. The CAA directs EPA to promulgate National Ambient Air Quality Standards (NAAQS) specifying allowable concentrations of some air pollutants. 42 U.S.C. 7408, 7409; *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 462 (2001). Each State must develop a "State implementation plan" (SIP) to achieve and maintain the NAAQS. 42 U.S.C. 7410; *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 249-250 (1976).

The CAA establishes various other programs to protect air quality. The NSR program consists of a Prevention of Significant Deterioration (PSD) program that seeks to prevent a significant decline of air quality in areas that already meet ambient air quality standards, and a nonattainment program for areas not satisfying those standards.[1] See 42 U.S.C. 7470-7479, 7501-7508. The NSR program imposes various requirements that must be satisfied when certain emissions sources are "constructed." 42 U.S.C. 7475(a). Enacted in 1977, the

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[1] In this enforcement action, the United States has alleged violations of both the PSD and nonattainment components of the NSR program. Because the programs do not differ in any respect material here, this brief cites only the PSD provisions.

NSR provisions define "construction" to include "modification," which is defined in turn by reference to the statutory definition of "modification" applicable to the preexisting New Source Performance Standards (NSPS) program. 42 U.S.C. 7479(2)(C), 7501(4). The NSPS provisions, enacted in 1970, define "modification" to be "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." 42 U.S.C. 7411(a)(4).

Although NSR and NSPS share a statutory definition of the term "modification," EPA has interpreted aspects of that definition differently for the two programs. By statute, NSR applies to the construction or modification of "major emitting facilit[ies]" or "major stationary sources." 42 U.S.C. 7475(a), 7479(1), 7502(c)(5), 7503. EPA's implementing regulations require a preconstruction permit for the construction of any "major stationary source" or "major modification," 40 C.F.R. 52.21(i), and define "major modification" to include "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act," 40 C.F.R. 52.21(b)(2)(i).[2]

The inquiry under that definition first requires identification of a "physical change in or change in the method of operation." 40 C.F.R. 52.21(b)(2)(i). At that step of the inquiry, there is an "hours of operation" exclusion, which provides that "[a] physical change or

---

[2] Like the petition, this brief cites to the 1987 recodification of EPA's regulations unless otherwise indicated. See Pet. 3 n.2.

change in the method of operation shall not include * * * [a]n increase in the hours of operation or in the production rate." 40 C.F.R. 52.21(b)(2)(iii)*(f)*.

If there is a physical or operational change, the next question is whether that change would result in a significant "net emissions increase." 40 C.F.R. 52.21(b)(2)(i). Under the regulations, a net emissions increase is an "increase in actual emissions from a particular physical change or change in method of operation at a stationary source." 40 C.F.R. 52.21(b)(3)(i)(*a*). Pre-change "actual emissions" equal "the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation." 40 C.F.R. 52.21(b)(21)(ii). Actual emissions are "calculated using the unit's actual operating hours, production rates and types of materials processed, stored, or combusted during the selected time period." *Ibid.*

The NSPS regulations, by contrast, provide that a "modification" is "any physical or operational change * * * which results in an increase in the emission rate to the atmosphere of any pollutant." 40 C.F.R. 60.14(a). The "emission rate" is the maximum hourly emissions from the relevant piece of equipment operating at its maximum achievable capacity, and is "expressed as kg/hr." 40 C.F.R. 60.14(b). Because it considers only maximum hourly rates, the NSPS test is not triggered by changes that increase emissions due only to increased hours of operation.

2. The United States brought suit against petitioners for failing to comply with NSR requirements in conducting certain refurbishment projects. The district court granted summary judgment for the United States on the question how to determine whether a physical or

operational change would result in an emissions increase for purposes of the PSD program. Pet. App. 9a-20a.

The district court rejected petitioners' argument that Congress required EPA to define "modification" for purposes of PSD in the same manner it had defined "modification" for purposes of NSPS. Pet. App. 16a-17a. The court concluded that Congress did not "intend[] to incorporate the regulatory definition" of modification under NSPS into the statute; that Congress "did not limit the EPA's authority to further define 'modification' in the regulations as it deemed fit to serve the purposes of the PSD program"; and that "nothing about the EPA's definition of 'modification' [for the PSD program] contradicts the statutory definition." *Ibid.*

The district court further upheld EPA's reading of its own PSD regulations, and rejected petitioners' argument that, under those regulations, emissions increases must be measured solely on an hourly basis, such that emissions increases could result only from an increase in the hourly rate of emissions, as opposed to an increase in the number of hours a plant is expected to be operated over the course of a year. Pet. App. 17a-20a. The court explained that under EPA's regulations, PSD requirements are triggered by a "major modification," which is a change causing "a significant net increase in a unit's 'actual emissions.'" *Id.* at 18a (quoting 45 Fed. Reg. 52,698 (1980)). Because actual emissions are measured using a unit's "actual operating hours and production rates," the court determined that "if a physical change will result in a unit increasing its operating hours, the projected actual operating hours would include the increase." *Ibid.* The court further explained that although increased hours of operation are excluded when determining whether there has been a physical or

operational change, they are not excluded when determining whether such a change has increased the plant's emissions. *Id.* at 19a.

3. The Seventh Circuit affirmed. Pet. App. 1a-8a. Examining the regulatory definitions of "major modification" and "significant net emissions increase," the court concluded:

> Since both the base emissions rate from which a significant increase is calculated, and the amount of the increase, are in terms of tons per year rather than per hour, the natural reading of the regulation is that any physical change or change in operating methods that increases annual emissions is covered.

Id. at 3a. The court rejected petitioners' argument that calculating emissions using "actual operating hours" requires EPA to use a constant, representative number of operating hours to calculate both pre- and post-change emissions, thus limiting increases to changes that result in an increase of the hourly emissions rate. See *ibid.* Rather, the court concluded that "'actual operating hours' is more naturally read to mean the total number of hours that the plant is in operation." *Ibid.* The court also found sufficient policy reasons supporting EPA's interpretation to "scotch the argument that the interpretation produces such outlandish consequences that it must be incorrect." *Id.* at 5a.

The court of appeals then turned to petitioners' "principal argument": that "Congress required that the regulation define 'modification' as a change in the hourly emissions rate." Pet. App. 5a-6a. The court of appeals concluded that, "[s]ince the regulation does not define it so, this seems an attack on the validity of the regulation rather than an argument about its meaning." *Id.* at 6a.

Because only the D.C. Circuit has "jurisdiction to review the validity of nationally applicable regulations issued pursuant to the Clean Air Act," the court concluded that petitioners' challenge is "beyond the jurisdiction of a regional circuit to resolve." *Id.* at 2a, 6a (citing 42 U.S.C. 7607(b)(1)). The court noted that the Fourth Circuit had "stepped out of bounds" in *United States* v. *Duke Energy Corp.*, 411 F.3d 539 (2005), cert. granted, 126 S. Ct. 2019 (2006), by adjudicating the same statutory argument. Pet. App. 7a.

The court of appeals nevertheless proceeded, in the alternative, to address petitioners' statutory argument and found it "unconvincing." Pet. App. 6a. The court held that Congress's use in the PSD program of a cross-reference to the *statutory* NSPS definition of "modification" did not "incorporate the agency's *regulatory* definition of modifications under the New Source Performance Standards into the provisions relating to the Prevention of Significant Deterioration program." *Ibid.* (emphasis added). The court explained that "[t]he same word can mean different things in the same statute," and found that is "certainly the case with a vague word like 'modification,' and all the more when the statutory provisions that contain the word were enacted by different Congresses for different purposes." *Id.* at 7a. While the NSPS and PSD statutes both define modification to be a physical change in a plant that results in an increase in emissions, the court explained that the programs

> are silent on whether the increase is in the hourly rate of emissions or in some other rate. The task of deciding was left to the EPA. There was nothing to require that it flesh out the vague statutory meaning in the identical way in different parts of the Clean Air Act adopted years apart and reflecting, to an ex-

tent anyway, different philosophies of pollution control.

Id. at 8a.

ARGUMENT

The questions presented in this case are already before this Court in *Environmental Defense* v. *Duke Energy Co.*, No. 05-848, which was argued on November 1, 2006, and provides a sufficient vehicle for resolving those questions. Because the petition is interlocutory, this Court should deny review at this time. Alternatively, this Court should hold the petition pending the decision in *Duke Energy*, and then dispose of it as appropriate in light of that decision.

1. As a threshold matter, this Court's review is unwarranted because of the interlocutory posture of the case. The court of appeals affirmed the district court's ruling that the PSD regulations measure emissions increases based on annual, rather than hourly, emissions. Pet. App. 1a-8a. The court of appeals did not, however, finally resolve EPA's civil enforcement action. Rather, it remanded for further proceedings in the district court, where a variety of issues remain to be resolved. See generally *id.* at 12a-13a. This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for a writ of certiorari); see *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

Following denial of the petition, the district court would have authority to apply this Court's upcoming decision in *Duke Energy*, see, *e.g.*, *Cameo Convalescent Ctr.* v. *Percy*, 800 F.2d 108, 110 (7th Cir. 1986), and petitioners could seek certiorari from any adverse final judgment, see, *e.g.*, *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001). Accordingly, the most efficient course would be to deny review at this time.

2. The court of appeals' decision is correct.

a. For purposes of the PSD program, EPA's regulations measure emissions increases based on annual, not hourly, emissions.

i. Those regulations require a preconstruction permit for the construction of, as relevant here, any "major modification." 40 C.F.R. 52.21(i). The regulations define "major modification" to include "any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase." 40 C.F.R. 52.21(b)(2)(i). A "[n]et emissions increase," in turn, is an "increase in actual emissions." 40 C.F.R. 52.21(b)(3)(i)(*a*).

As the court of appeals correctly recognized, the PSD definition of "actual emissions" measures emissions "in tons per year," not per hour. 40 C.F.R. 52.21(b)(21)(ii); Pet. App. 3a. Whether a net emissions increase is "significant" is also measured in "tons per year." 40 C.F.R. 52.21(b)(23)(i). Thus, the PSD regulations plainly require consideration of actual, annual emissions—not hourly emissions. Other courts have likewise recognized that the PSD regulations, unlike the NSPS regulations, focus on increases in actual annual, not hourly, emissions. See *New York* v. *United States EPA*, 413 F.3d 3, 15 (D.C. Cir. 2005); *Wisconsin Elec.*

Power Co. v. *Reilly*, 893 F.2d 901, 915 (7th Cir. 1990) (*WEPCO*); *Puerto Rican Cement Co.* v. *United States EPA*, 889 F.2d 292, 293-294, 297-298 (1st Cir. 1989).

The court of appeals' reading of the regulations' plain language is supported by EPA's explanations, from 1980 on, that the PSD regulations focus on the actual impact of emissions on ambient air, on an annual basis, including by examining a unit's hours of operation. The preamble to the 1980 regulations explains that the regulations measure increases in "actual emissions," calculated in "tons per year," and that a PSD permit is required if plants "increase pollution." 45 Fed. Reg. at 52,700. In addition, preambles to the 1980 and proposed 1983 regulations describe the effect that changing the hours of operation could have on PSD emissions. *Id.* at 52,705; 48 Fed. Reg. 38,747 (1983). In a 1982 settlement agreement with challengers to the 1980 regulations, including Cinergy, EPA agreed to propose to *change* the 1980 regulations to *include* the very hourly emissions rate test that petitioners now contend the regulations already mandated, thus clearly demonstrating EPA's view that the existing regulations did *not* impose such a test. See 54 Fed. Reg. 27,274 (1989); 61 Fed. Reg. 38,268-38,269 (1996); 70 Fed. Reg. 61,098 (2005).

In 1988 and 1989, EPA issued applicability determinations that unquestionably applied a total annual emissions test, resulting in the cases of *WEPCO* and *Puerto Rican Cement*, which endorsed the use of such a test. See *WEPCO*, 893 F.2d at 906, 916 (noting that EPA assumed emissions increases would come "not from an increase in emission rate, but rather from increases in production rate or hours of operation") (quoting EPA Supplemental Determination at 9, *WEPCO*, *supra* (Nos. 88-3264, 89-1339)); *Puerto Rican Cement*, 889 F.2d at

294 (noting that EPA charts made clear "that emissions will increase only if the company operates the new kiln at significantly higher production levels"). In doing so, EPA confirmed—well before initiation of this litigation—that "hourly capacity demonstration for NSPS purposes is not relevant to the PSD analysis." U.S. Reply Mem. in Support of Mot. for Partial Summ. J., Exh. 32, at 10 (U.S. Summ. J.) (EPA's 1989 final determination that WEPCO's actions triggered PSD requirements); see *id.* at 12 (an NSPS non-applicability determination "does not affect PSD applicability"); Pet. C.A Supp. App. 259-269 (EPA's 1990 WEPCO remand determination applying actual-to-projected-actual emissions increase test). EPA's interpretation of its own regulations is entitled to deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).

As a party to the 1982 settlement agreement, and to the filing of industry amicus briefs in *WEPCO* and *Puerto Rican Cement*, Cinergy was well aware of EPA's interpretation. In 1989, an industry briefing paper recognized that EPA's *WEPCO* determination "found that PSD review would be required even though the units were not increasing their emission rate" and that "major repairs and replacements that improve 'reliability' and 'efficiency' but do not increase (and may even *reduce*) emission rates can require a PSD permit." U.S. Summ. J., Exh. 38, Attach. at 1, 8. See *id.* Exh. 28, at 9 (industry amicus brief in *WEPCO* notes that, in its *WEPCO* determination, "EPA emphasized that PSD requirements would apply even where the project merely improved the availability and reliability of the facility, and was not needed to restore lost capacity"). Contrary to petitioners' assertions (Pet. 10), EPA explained its inter-

pretation to the States as well.[3] See Pet. C.A. Supp. App. 153 (1990 EPA letter to the Indiana Department of Environmental Management stating that, for NSR purposes, "[a]nnual emissions are the product of the hourly emissions rate, which is the sole concern of NSPS, times the utilization rate, expressed as hours of operation per year").

ii. Petitioners nonetheless complain (Pet. 11) that the court of appeals "ignored" their argument that "the plain language of the regulations and simple common sense dictate that a project cannot be a 'major modification' if it does not constitute a 'modification' in the first instance." The court of appeals correctly dismissed that argument as "makeweight[]." Pet. App. 8a. Under EPA's regulations, as discussed above, PSD requirements are triggered by a "major modification," which is defined separately from the inapposite definition of "modification" on which petitioners rely. (EPA's use of the term "major modification" as the regulatory trigger for PSD, rather than "modification," derives from the fact that the PSD requirements apply to "major emitting facilities." See 42 Fed. Reg. 57,480 (1977); see generally U.S. Br. at 9, *Duke Energy, supra* (No. 05-848).)

The irrelevance of the regulation on which petitioners rely, 40 C.F.R. 52.01(d), is confirmed by other factors. That regulation is not contained in the relevant SIPs, which provide the applicable law in this case. On August 7, 1980, EPA disapproved Ohio's and Indiana's proposed PSD programs and incorporated by reference

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[3] Petitioners' contention (Pet. 10) that EPA's interpretation constitutes a federal power grab raising "cooperative federalism" concerns is undercut by the fact that 21 States, the District of Columbia, and the national association representing the air pollution directors of all the States supported the United States in *Duke Energy*.

portions of the PSD regulations of 40 C.F.R. 52.21 into the Ohio and Indiana SIPS, which apply here. See 40 C.F.R. 52.793, 52.1884. Because that incorporation did not include Section 52.01(d), that provision is irrelevant. See 40 C.F.R. 52.793, 52.1884; Ohio Admin. Code § 3745-31-01(AAA) and (1)(a)(iv) (2003) (defining "modification" as change that "[i]s otherwise defined as a major modification"); Ind. Air Pollution Control Bd. reg. APC 19 (Feb. 9, 1982); and Ind. Admin. Code tit. 326, r. 2-3-1 (2003) (two different Indiana SIPs, before and after December 6, 1994, contain no separate definition of "modification").

Moreover, the definition of "modification" relied on by petitioners applies only to sources emitting pollutants "for which a national standard has been promulgated under Part 50 of this chapter"—*i.e.*, pollutants for which EPA has established NAAQS. Because the current PSD program is not so limited, that definition could not apply to that program. Cf. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 404 (D.C. Cir. 1979) (noting that "[t]he language of the Act does not limit the applicability of PSD only to one or several of the pollutants regulated under the Act").[4]

Nor is petitioners' argument, as they would have it (Pet. 5, 11), based on "common sense." It was not until sometime in 2005—more than 25 years after the 1980 PSD regulations were promulgated—that industry first made the argument proffered here. Indeed, just as industry had never made the regulatory "modification" argument in *Duke Energy* until it filed its merits briefs

[4] Cases like *New York*, *WEPCO*, and *Puerto Rican Cement* did not involve only changes triggering the NSPS hourly emissions test, confirming that the PSD regulations do not require both an NSPS modification and a PSD major modification. See pp. 10-11, *supra*.

in this Court, petitioners had never made that argument in this case until they filed their merits brief in the court of appeals. Every court to address the meaning of "modification" for the PSD program has looked solely to the definition of "major modification." See Pet. App. 2a, 12a; *New York*, 413 F.3d at 14; *WEPCO*, 893 F.2d at 915; *Puerto Rican Cement*, 889 F.2d at 295-297; *Alabama Power Co.*, 636 F.2d at 399-400. Contrary to petitioners' assertions (Pet. 2), it is industry, not EPA, that has invented a new regulatory interpretation for litigation purposes.

iii. Petitioners' other regulatory arguments fare no better. Petitioners argue (Pet. 12) that for purposes of determining whether a project would increase "actual emissions," as measured in "tons per year" under 40 C.F.R. 52.21, EPA's regulations provide that the agency must use, in petitioners' words, "constant, representative hours of operation." As petitioners explain (Pet. 12), holding hours constant in that manner, even when a physical change would actually cause hours to increase, would effectively convert EPA's annual standard into an hourly one.

That contention—which is a wholly implausible way of measuring "actual emissions" in "tons per year" (40 C.F.R. 52.21)—finds no support in EPA's regulations. Under 40 C.F.R. 52.21(b)(21)(ii), the *pre-change* baseline is generally measured based on "actual emissions * * * during a two-year period which precedes the particular date and which is representative of normal source operation." That provision ensures that the pre-change baseline reflects representative *actual* emissions. It does not suggest, in any way, that *post-change* "actual" emissions should be based on a counterfactual assessment of what future emissions would be if post-change hours of

operation were held to pre-change levels (even when they would actually increase because of a change). To the contrary, the regulation stresses that "[a]ctual emissions shall be calculated using the unit's *actual operating hours*, production rates, and types of materials processed, stored, or combusted during the selected time period." *Ibid.* (emphasis added). Thus, the court of appeals correctly concluded that EPA's regulations require consideration of a unit's actual hours of operation, both before and after a physical or operational change. Pet. App. 3a.

Petitioners also contend (Pet. 12) that the court of appeals should have recognized that the regulatory "hours of operation" exclusion from the definition of *physical or operational change* precludes EPA from considering hours of operation in measuring *emissions increases*. Petitioners made no such argument before the Seventh Circuit, which had previously, and correctly, rejected that contention in *WEPCO*, 893 F.2d at 916 n.11.[5] Under EPA's regulations, a "modification" requires both a physical or operational change *and* an increase in emissions. 40 C.F.R. 52.21(b)(2)(i). The provision relied on by petitioners states only that "[a] physical change or change in the method of operation shall not include * * * [a]n increase in the hours of operation or in the production rate." 40 C.F.R. 52.21(b)(2)(iii)*(f)*. While that provision excludes increases in the hours of operation from the definition of physical or operational change, it does not exclude such increases from consideration on the separate question whether a physical or

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[5] In their statement of facts, petitioners stated that the regulations provide that the term "modification" does not include "[a]n increase in the hours of operation" of the unit. Pet. C.A Br. 13. But petitioners provided no analysis or argument on that point.

operational change would result in an emissions increase. See 45 Fed. Reg. at 52,704; 57 Fed. Reg. 32,328 (1992). Thus, the court of appeals correctly explained that the exclusion applies where a company runs "the plant closer to its maximum capacity" without making a physical or operational change, but does not apply if "a physical change enables the plant to increase its output." Pet. App. 2a-3a.

iv. Petitioners assert (Pet. 12-13) that the court of appeals ignored prior regulatory interpretations by two subordinate EPA officials. The two 1981 statements, however, pertain to the irrelevant "hours of operation" exclusion discussed above. Even if those statements were read to support petitioners' argument, they could not be reconciled with the regulations' plain language and contemporaneous preamble or with the subsequent interpretation adopted by the EPA Administrator—the head of the agency—and upheld by the Seventh Circuit in the *WEPCO* proceeding. See *WEPCO*, 893 F.2d at 916 n.11. The 1982 memorandum from an EPA regional employee simply states that a "modification [that] does not *cause* any increase in emissions" does not trigger PSD requirements, which is wholly consistent with EPA's longstanding interpretation. Pet. C.A. Supp. App. 283-285. Moreover, as discussed above, EPA has repeatedly expressed its interpretation of the regulations' plain meaning, and petitioners and other members of industry have repeatedly acknowledged that interpretation, since 1980.

v. Petitioners err in concluding (Pet. 2) that EPA's interpretation extends to "commonplace maintenance, repair, and replacement projects." The definition of "major modification" excludes "[r]outine maintenance, repair and replacement." 40 C.F.R. 52.21(b)(2)(iii)(*a*).

Here, the court of appeals noted that petitioners have conceded for present purposes that their plant modifications were not routine maintenance, repair, or replacement. Pet. App. 2a.

b. After determining that EPA's PSD regulations could not reasonably be read to measure emissions increases based on an hourly rate test, the court of appeals correctly rejected petitioners' claim that the CAA *requires* such a reading. Under Section 307(b), a court adjudicating a CAA enforcement action may not invalidate actions of the Administrator, such as the promulgation of the nationally applicable PSD regulations at issue here, if review "could have been obtained" pursuant to a properly filed petition for review in the D.C. Circuit. 42 U.S.C. 7607(b)(2); *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578 (1980).

Petitioners do not dispute that Section 307(b) bars invalidation of the regulations. Rather, they argue (Pet. 16-17) that they are challenging not the regulations, but a new interpretation of those regulations. As the court of appeals explained, that argument fails because, as discussed above, the regulations' meaning is evident on their face, and they are not reasonably susceptible of the interpretation proffered by petitioners. See Pet. App. 6a. Nor, as discussed above, has EPA changed its interpretation. Instead, petitioners are impermissibly challenging the regulations themselves, no matter how they characterize their challenge.

Indeed, petitioners not only could have obtained review of their claim in a challenge to the regulations' validity in the D.C. Circuit; they did so. In *New York*, *supra*, the D.C. Circuit ruled on numerous petitions for review filed in 1980, 1992, and 2002 to challenge PSD regulations issued in those years. Cinergy was a party

to petitions challenging all three sets of PSD regulations, including the 1980 regulations at issue here. The brief filed by the electric utility industry parties, including Cinergy, expressly argued that the 1980 PSD regulatory definition of modification was unlawful to the extent that it differed from the NSPS hourly rate emissions test. *New York*, 413 F.3d at 18. The D.C. Circuit "reject[ed] this portion of industry's challenge to the 1980 * * * rules." *Id.* at 20.

c. In the alternative, the court of appeals correctly held that petitioners' statutory challenge to EPA's regulations fails on its merits. As that court recognized, the PSD cross-reference to the NSPS statutory definition of "modification" "says nothing about hourly versus annual emissions" and "does not purport to incorporate the agency's [hourly-rate-based] regulatory definition of modifications" under NSPS into the PSD provisions. Pet. App. 6a. The D.C. Circuit has similarly rejected petitioners' argument. *New York*, 413 F.3d at 19.

The court of appeals also correctly rejected the theory relied on by the Fourth Circuit in *United States* v. *Duke Energy Corp.*, 411 F.3d 539, 546-547 (2005), cert. granted, 126 S. Ct. 2019 (2006), which is that Congress's use of identical statutory definitions of "modification" in the PSD and NSPS programs requires EPA to apply the term identically in both programs. The court followed the well-established rule that "[t]he same word can mean different things in the same statute," which is "certainly the case with a vague word like 'modification'" (particularly when that term is defined using other ambiguous terms). Pet. App. 7a. Moreover, the Fourth Circuit's theory is irreconcilable with fundamental principles of deference to agency interpretations of ambiguous statutory text. By directing EPA to employ the

same ambiguous statutory definition of "modification" in two separate regulatory programs, Congress necessarily delegated to EPA the discretion to resolve those ambiguities differently for (or within) each program if the agency reasonably concludes that different approaches would best achieve the purposes of the respective programs.

Even the Fourth Circuit in *Duke Energy* rejected the theory advanced by petitioners here (Pet. 14): that the CAA requires EPA to apply an hourly emissions rate test in determining whether there is an NSR modification. As the Fourth Circuit recognized, the statutory definition of "modification" contains ambiguous terms that delegate to EPA the discretion to determine how emissions increases should be measured. *Duke Energy*, 411 F.3d at 550-551. Thus, that court held only that EPA must apply the same test to both programs; not that it must apply an hourly-rate test to both. *Id.* at 549 n.7. During the seven years before Congress created the statutory PSD program, EPA certainly had discretion to measure emissions increases under the NSPS program alone in different manners for different sources or pollutants, assuming there was a reasonable justification for doing so. Nothing in the 1977 amendments adding the NSR program to the CAA demonstrates a congressional intent to remove such discretion, with respect to either the NSPS or the NSR program.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the petition should be held pending this Court's decision in *Environmental Defense* v. *Duke Energy Co.*, No. 05-848, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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IN THE

Supreme Court of the United States

CINERGY CORPORATION, PSI ENERGY, INC.,
CINCINNATI GAS & ELECRIC CO.,
and CINERGY SERVICES, INC.,

Petitioners,

v.

UNITED STATES, STATE OF NEW YORK,
STATE OF CONNECTICUT, STATE OF NEW JERSEY,
HOOSIER ENVIRONMENTAL COUNCIL,
and OHIO ENVIRONMENTAL COUNCIL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENTS THE STATES OF NEW YORK, CONNECTICUT, AND NEW JERSEY, HOOSIER ENVIRONMENTAL COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL

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INTRODUCTION

The States of New York, New Jersey and Connecticut ("State Respondents") submit this brief in response to the petition for a writ of certiorari of Cinergy Corporation *et al.* ("Cinergy").[1] We agree with petitioners that the decision of the Seventh Circuit below, *United States v. Cinergy*, 458 F.3d 705 (7th Cir. 2006), squarely conflicts with the decision of the Fourth Circuit that is under review in *Environmental Defense, et al. v. Duke Energy Corp.*, No. 05-848 (argued Nov. 1, 2006). Instead of granting certiorari at this time, however, the Court should hold Cinergy's petition in abeyance until *Duke Energy* is decided.

Both cases involve the U.S. Environmental Protection Agency's ("EPA") interpretation of the definition of "major modification" under the 1980 Prevention of Significant Deterioration ("PSD") regulations, 40 C.F.R. § 51.166(b)(2)(i). The Seventh Circuit agreed with EPA and the State Respondents that a "major modification" for purposes of the PSD regulations occurs when a physical change at a polluting facility increases *actual annual* emissions. *See Cinergy*, 458 F.3d at 708-10. In contrast, the Fourth Circuit adopted the utility industry's view that a major modification occurs only if the physical change increases the facility's maximum *hourly* emissions rate.[2] *See Duke Energy Corp. v. Environmental Defense*, 411 F.3d 539, 546-49 (4th Cir. 2005), *cert. granted*, 126 S.Ct. 2019 (2006).

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1. The State Respondents are joined in this submission by respondents Hoosier Environmental Council and Ohio Environmental Council.

2. In adopting a test based on the maximum hourly emissions rate, the Fourth Circuit utilized the test required under regulations governing a different regulatory program, the New Source Performance Standards ("NSPS"). *See* 40 C.F.R. § 60.14.

In *Duke Energy*, petitioners Environmental Defense, *et al.*, argue two separate grounds for reversing the Fourth Circuit. First, they argue that the Fourth Circuit's decision intruded on the D.C. Circuit's exclusive authority to review final agency actions under the Clean Air Act, 42 U.S.C. § 7607, and thus that the Fourth Circuit lacked jurisdiction to decide the case as it did. *See* Petitioners' Brief in *Environmental Defense v. Duke Energy Corp.*, No. 05-848, at 26-38. Second, they contend that the Fourth Circuit erred on the merits in reading the NSPS hourly emission test into the PSD definition of a "major modification," which requires an increase in *annual* emissions, not *hourly* emissions. *Id.* at 38-50. If the Court reverses the Fourth Circuit's decision on either of these grounds, the conflict between the circuits would no longer exist and Cinergy's petition should be denied. On the other hand, Cinergy's petition should be granted only if the Court rules in favor of *Duke Energy* on both the jurisdictional and merits issues.

In support of its petition here, Cinergy argues that the Fourth Circuit was correct and the Seventh Circuit incorrect on the merits. As explained below, Cinergy is wrong. Indeed, there is a document that was introduced below in *Cinergy* that is not in the *Duke* record, showing that the utility industry fully understood the meaning of the regulations at issue. *See* discussion of Nickel Memorandum, *infra* at 7. Accordingly, the Court should hold Cinergy's petition in abeyance pending its decision in *Duke Energy* and deny the petition if it vacates the Fourth Circuit's decision in *Duke Energy*.

ARGUMENT

I. Cinergy Relies Erroneously On A Superseded Regulation In Support Of Its Contention That The NSPS Emissions Test Applies As A Threshold To Determine Whether Its Renovation Projects Constitute PSD "Major Modifications"

In its petition, Cinergy erroneously asserts that one must first determine whether an NSPS "modification" has occurred before reaching the question of whether a PSD "major modification" has occurred. Petition at 3, 11-12. In support of this proposition, Cinergy relies on 40 C.F.R. § 52.01(d), which defines "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant." *See* Petition at 3, 11, 12; *see also* Duke Br., No. 05-848, at 6, 10, 23, 28 (making the same argument).

The Seventh Circuit correctly dismissed this argument as "makeweight." *Cinergy*, 458 F.3d at 711.[3] The term

3. The Seventh Circuit also ruled that EPA's interpretation of the phrase "major modification" as requiring examination of *actual annual* emissions increases is supported by a "natural reading of the regulation." 458 F.3d at 708; *accord New York v. EPA*, 413 F.3d 3, 15-16 (D.C. Cir.) (PSD emissions test measures changes in "actual annual" emissions), *reh'g denied*, 431 F.3d 801 (2005); *Wisconsin Electric Power Co. v. Reilly* ("*WEPCo*"), 893 F.2d 901, 913, 915 (7th Cir. 1990) (regulations for NSPS and PSD programs "measure[] emissions in a fundamentally distinct manner," with NSPS test "concerned primarily with . . . emissions rates, expressed in kilograms per hour" and PSD test "concerned with changes in total annual emissions, expressed in tons per year"); *Puerto Rican Cement Co. v. EPA*, 889 F.2d 292, 296-99 (1st Cir. 1989) (PSD regulations triggered if annual emissions will increase even if plant's hourly rate of emissions will remain same). In *Duke Energy*, without addressing the language of the PSD regulations, the Fourth Circuit held that the PSD regulations "can" be interpreted consistently with the maximum hourly emissions test set forth in NSPS regulations. 411 F.3d at 549 n.7.

"modif[illegible]on" plays no role in defining the separate regulatory term "major modification," which has its own definition predicated on a "physical change or change in the method of operation," 40 C.F.R. § 51.166(b)(2)(i), rather than on a "modification."[4] Even if somehow incorporated into the definition of "major modification" under § 51.166(b)(2)(i), the term "modification" under § 52.01(d) does not help petitioners because it is defined in terms of an unspecified "increase [in] emission rate," not in terms of an hourly emission increase.[5] Under PSD, the applicable "rate" is tons per year. 40 C.F.R. § 51.166(b)(21)(i), (ii). The record shows, moreover, that the regulation relied on by Cinergy (and Duke), § 52.01(d), was replaced and superseded by a 1978 version of the PSD regulations that, in turn, was abandoned in 1980 by promulgation of the PSD regulations at issue here. *See Alabama Power Co. v. Costle*, 636 F.2d 323, 348 n.24 (D.C. Cir. 1979) (referring to § 52.01 as "superseded"); *Env'tl Defense Fund, Inc. v. EPA*, 898 F.2d 183, 184 n.1 (D.C. Cir. 1990) (explaining history of PSD regulations' promulgation).[6]

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4. *See Alaskan Trojan Partnership v. Gutierrez*, 425 F.3d 620, 631 (9th Cir. 2005) (giving effect to differences in regulatory definitions of "catcher vessels and catcher/processor vessels" because regulations "separately defin[ed] each term"); *Matter of Esco Mfr. Co. v. Pritchard*, 50 F.3d 315 (5th Cir. 1995) (definition of "plan administrator" unhelpful in understanding separately defined term "plan sponsor").

5. As part of its initial PSD regulations, EPA in 1974 interpreted "modification" under § 52.01 to be "consistent with" the NSPS regulatory definition of that term. 39 Fed. Reg. 42,510, 42,513/1 (Dec. 5, 1974). The NSPS definition in effect at that time, however, applied simply to "increases [in] the amount of any air pollutant," with *no* reference to hourly emission rates. *See* 36 Fed. Reg. 15,704, 15,705/1 (Aug. 17, 1971); *see also Duke Energy*, 411 F.3d at 542.

6. That EPA makes no mention of § 52.01(d) in the preambles to its 1980 and 1992 PSD regulations at issue here is further evidence of the irrelevance of that provision. *See* 45 Fed. Reg. 52,676 (Aug. 7, 1980); 57 Fed. Reg. 32,314 (July 21, 1992).

Even if the § 52.01(d) definition of "modification" is to be grafted onto the governing definition of "major modification," an affirmance in *Duke Energy* would not necessarily require the reversal of the Seventh Circuit's decision at issue here because the governing PSD requirements in any given state are determined by that state's implementation plan ("SIP"), rather than the federal regulations. In Ohio and Indiana, the states where Cinergy's plants at issue are located, the PSD regulations that were approved by EPA, *see* 40 C.F.R. §§ 52.793, 52.884, do not include the § 52.01 definition. Instead, only the definition of "major modification" under 40 C.F.R. § 52.21 (which is identical, in relevant part, to § 51.166) was incorporated into those states' SIPs and is applicable here. *See* 46 Fed. Reg. 9,580/3, 9583/3 (Jan. 29, 1981).[7]

II. Cinergy's Claim That The Utility Industry Long Understood The PSD Regulations To Provide A Maximum Hourly Emissions Rate Test Is Refuted By The Record

Cinergy also premises its Petition on the unsupported claim that "at the time these projects occurred, no one at Cinergy believed that they triggered NSR." Pet. at 4; *see also* Duke Br. in No. 05-848 at 16-19. Cinergy's contention echoes Duke's claim at oral argument that:

> [I]t is very clear that the understanding of *everyone in the industry* . . . from 1980, candidly well beyond

7. In contrast, Duke's counsel appeared to argue that South Carolina's PSD regulations do incorporate the § 52.01 definition, Transcript of Oral Argument in No. 05-848, at 27-28, although counsel did not cite to the record in support of this proposition. In fact, the PSD preconstruction requirements under South Carolina's regulations, which were approved by EPA, are applicable only to "the major modification of any existing major stationary source." *See* S.C. Code Regs. 61-62.5, Std. 7(a)(2)(ii). The term "modification" is not separately defined in South Carolina's PSD regulations.

> 1988 all the way up to 1999, was that the regulations didn't apply under any circumstances in the absence of an increase the capacity . . . [a]nd you had to demonstrate that there would be an increase in the hourly rate of emissions.

See Transcript of Oral Argument in No. 05-848 at 25-26 (emphasis added).

This contention is contradicted by a multitude of historical documents, showing that industry long understood the 1980 PSD regulations the same way EPA does. In a 1981 brief filed in their original challenge to the 1980 PSD regulations, for example, industry petitioners interpreted the regulations in the same manner as EPA does here, stating that (i) the regulations "provide that a modification occurs whenever a series of contemporaneous changes at a source result in a significant increase in *actual* emissions, even though the source's net *capacity* to emit remains constant or declines," and (ii) the "question of whether there is a net increase in actual emissions requires that variations in the source's hours and rates of operation be taken into account." *See* Brief for Industry Petitioners in *Chemical Mfg. Ass'n v. EPA*, No. 79-1112 (D.C. Cir.), dated Feb. 12, 1981, pp. 5-6, 28-29 (filed with Court in *Duke Energy*). A settlement agreement entered into by EPA and industrial polluters, including Cinergy and Duke, to resolve that regulatory challenge required EPA to *propose* changing the PSD emissions test to allow emissions increases to be based on a "source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour)." *See* Exhibit B to Settlement Agreement, executed on Feb. 22, 1982, in *Chemical Mfg. Ass'n v. EPA*, No. 79-1112 (D.C. Cir.), at p. 1. This proposal

would have been unnecessary had the PSD regulations already provided an hourly potential emissions test.[8]

Moreover, additional documents show that the utility industry long understood EPA's assertion that the PSD and NSPS emissions tests are separate and different. For example, a publicly-available document prepared by a utility industry representative establishes that industry fully understood that the § 52.01 definition of "modification" is inapplicable to PSD. In a July 29, 1988 memorandum, Henry V. Nickel – counsel for the Utility Air Regulatory Group ("UARG") and Duke's co-counsel in *Duke Energy* – acknowledges that § 52.01(d) is irrelevant to PSD applicability: "[I]n adding the more specific 'major modification' definition to § 52.21, EPA made clear that it, and not the general definition in 40 C.F.R. § 52.01(d), applies to the PSD program." *See* Dist. Ct. Doc. No. 587, Ex. 8, at 38 n. 77.[9]

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8. At various times since 1981, EPA considered industry's proposal to change the PSD emission test to one based on increases in maximum hourly emissions, but ultimately rejected that approach in 1996. *See, e.g.*, 61 Fed. Reg. 38, 250, 38,269/2 (July 23, 1996) (rejecting adoption of maximum hourly emissions test based on concern that such a test would allow a source "owner to use the [operating unit] at much higher levels (*e.g.*, more hours per day or week) than it had in the past" and thus "increase [] utilization even though hourly potential emissions remain the same").

9. The Nickel memorandum was attached initially to a letter written by the Wisconsin Electric Power Company ("WEPCO") to EPA in the context of EPA's determination that WEPCO's life extension projects constituted "major modifications" and triggered the PSD pre-construction requirements. *See Wisconsin Electric Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1990). The memorandum was also included as part of the publicly available rulemaking docket associated with EPA's 1992 PSD regulations, 57 Fed. Reg. 32,314 (July 21, 1992). In the district court below, plaintiffs here filed the memorandum under seal as part of their Motion for Partial Summary Judgment on the Legal Standard for the Routine Maintenance, Repair and Replacement Exclusion, dated Sept. 12, 2005. Because the document is publicly available, it should not have been filed under seal.

Consistent with this position, UARG recognized, in a June 5, 1989 letter to the Department of Energy, that EPA requires PSD review even for physical changes that "will not increase the [hourly] emission rate of the units." Dist. Ct. Doc. No. 295, Ex. 38, at 8-9. *See also* UARG *Amicus Brief* in *WEPCo*, dated May 22, 1989 (Dist. Ct. Doc. No. 295, Ex. 28, at 9) (acknowledging that EPA reads PSD requirements to "apply even where the project merely improved the availability and reliability of the facility, and was not needed to restore lost capacity"). These admissions, like the others in the *Duke Energy* record discussed in the briefs of petitioners in that case,[10] cannot be reconciled with Cinergy's litigation position in this case.

The utility industry's understanding that the PSD requirements apply to projects that do not increase hourly emissions rates is consistent with repeated statements by EPA over the last two decades that the PSD regulations *do not* include or incorporate an NSPS-like maximum hourly rate test. In adopting the 1980 PSD regulations, EPA specified that a source could increase hours of operation "to take advantage of favorable market conditions" without triggering PSD but not if such increase was associated with "construction activity." 45 Fed. Reg. at 52,704/2; *see also WEPCo*, 893 F.2d at 916 n.11 (same). In adopting changes to its PSD regulations in 1992, EPA again explained that the different emissions tests under the PSD and NSPS regulations "reflect[] the fundamental distinctions between the technology-based provisions of NSPS and the air quality-

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10. For example, a 1991 Duke compliance manual states flatly that PSD is based on increases in "annual emissions" and can be triggered if a project causes a unit to be "operated more frequently." *See* United States Reply Br. in No. 05-848 at 14, n. 11.

based provisions of NSR." 57 Fed. Reg. at 32,316/1.[11] Making no mention of § 52.01(d), EPA reiterated that an "increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review." *Id.* at 32, 328/1.[12] Accordingly, the claim made by Cinergy (and by Duke) that the electric utility industry did not understand the PSD regulations to mandate an actual annual emissions test is unsupported by the factual record.

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11. The PSD provisions, properly construed, provide assurance that industrial facilities will not, by expanding operations and thus emissions, undermine the states' efforts to prevent air quality from deteriorating. In furtherance of this goal, the PSD regulations consider real-world pollution impacts of refurbishment projects on air quality: if a unit actually pollutes more as a result of a project, the unit must install pollution controls. The maximum hourly emissions test that Cinergy (and Duke) urges would have the opposite effect. It would allow power plant renovation projects that are intended to increase the number of hours a facility may operate, with consequent increases in annual emissions, to evade review under a statute that is intended to address "any physical change" that may cause deterioration of air quality. 42 U.S.C. §§ 7411(a)(4), 7475(a)(3), 7479(2)(C).

12. Similarly, the record in this case includes a September 9, 1988 applicability determination regarding the WEPCO Life Extension Project in which EPA made clear that, for PSD purposes, "[t]he fact that [a] project is intended to restore the plant's original design capacity is irrelevant to" calculating emissions increases and that "increase[s] [in] production rate or hours of operation [that] are inextricably intertwined with the physical changes" may be considered in such a calculation. Appellants' Supp. App. 292-93.

CONCLUSION

Accordingly, the Court should hold Cinergy's petition in abeyance pending a decision in *Duke Energy*, No. 05-848.

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IN THE

Supreme Court of the United States

CINERGY CORPORATION, PSI ENERGY, INC., CINCINNATI GAS & ELECTRIC CO., AND CINERGY SERVICES, INC.,

Petitioners,

v.

UNITED STATES OF AMERICA

AND

STATE OF NEW YORK, STATE OF CONNECTICUT, STATE OF NEW JERSEY, HOOSIER ENVIRONMENTAL COUNCIL, AND OHIO ENVIRONMENTAL COUNCIL,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is a clear "hold" for *Duke Energy*, which was argued on November 1, 2006, and which this Court will decide this Term. Indeed, the Government acknowledges that "[t]he questions presented in this case are already before this Court in *Environmental Defense* v. *Duke Energy Co*[*rp*].," and that a "hold" is at least appropriate. U.S. Br. in Opp'n at 8. The Respondent States concede without qualification that "the Court should hold Cinergy's petition in abeyance until *Duke Energy* is decided." States Br. in Opp'n at 1.

Faced with an obvious "hold-for" petition, Respondents nonetheless make two arguments. First, the Government argues that the Court should deny the petition notwithstanding the pendency of *Duke Energy*, because this is an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Second, the Government and the Respondent States then devote substantial briefing to the merits—in an apparent attempt to show that Cinergy's case is an inadequate vehicle for the issues deemed to be worthy of review by this Court in *Duke Energy*. Respondents are incorrect on both counts.

I. THE PROPER DISPOSITION OF THIS PETITION IS TO HOLD FOR *DUKE ENERGY*.

The Government argues that the Petition should be denied, rather than held, because the appeal is "interlocutory." U.S. Br. in Opp'n at 8-9. The Government provides no other reason to deviate from the Court's regular practice of holding petitions pending the resolution of cases involving the same issues—and none exists. To the contrary, there is an important reason to follow the ordinary practice in this case. If the Court does not reach the questions presented in *Duke Energy*, this petition provides a vehicle to do so.

In such an event, the interlocutory posture of the decision below would be "no impediment to certiorari," because the court of appeals "has decided an important issue, otherwise

worthy of review" and final resolution of that issue will "serve to hasten or finally resolve the litigation." Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 260 (8th ed. 2002). These factors plainly are present here, because (1) the decision below squarely conflicts with the decision of another court of appeals regarding issues that this Court already has deemed sufficiently important to warrant certiorari; and (2) the courts below have concluded that the issues "involve[] a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). As the district court observed in certifying these issues for interlocutory appeal, the questions presented are "central to this litigation," and "control[] how the parties must calculate emissions increases to determine the facts of this case for trial"—which, if it occurs, is certain to be lengthy and complex. Pet. App. 24a. Thus, the Court's ultimate disposition of the issues presented will significantly "expedite the resolution of this case." *Id.*

The Court frequently grants certiorari in discretionary § 1292(b) appeals such as this. See, *e.g.*, *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 (2005) (reviewing decision reversing and remanding denial of Rule 12(b)(6) motion to dismiss complaint); *Norfolk S. Ry.* v. *Kirby*, 543 U.S. 14, 22 (2004) (reviewing decision reversing and remanding grant of motion for partial summary judgment); *Jones* v. *R.R. Donnelley & Sons Co.*, 541 U.S. 369, 374 (2004) (reviewing decision reversing and remanding denial of motion for summary judgment); *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 5-6 (2003) (reviewing decision reversing and remanding denial of motion to remand removed case); *Bartnicki* v. *Vopper*, 532 U.S. 514, 521-22 (2001) (reviewing decision reversing and remanding denial of motion for summary judgment); *Harris Trust & Sav. Bank* v. *Salomon Smith Barney, Inc.*, 530 U.S. 238, 243-44 (2000) (reviewing decision reversing and remanding denial of motion for summary judgment). In short,

the posture of this case counsels *in favor of* holding, and if necessary granting, the petition.

II. THIS PETITION SQUARELY PRESENTS THE QUESTIONS AT ISSUE IN *DUKE ENERGY*.

In an apparent effort to show that this case is an inadequate vehicle through which to address the questions presented, Respondents devote considerable attention to the merits. These issues already have been fully briefed in *Duke Energy*, and further briefing in that case is unnecessary and inappropriate. As for this petition, Cinergy has three principal responses.

First, Cinergy is not relying on a "superseded" regulation, as the States contend. See States Br. in Opp'n at 3-5. The States rely upon a stray parenthetical in a footnote in the D.C. Circuit's lengthy *Alabama Power* decision. See *id.* at 4 (citing *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 348 n.24 (D.C. Cir. 1979)). Tellingly, the Solicitor General does not make this argument. Indeed, confirming the error in this position requires only a quick look at the Code of Federal Regulations. Section 52.01(d) has appeared in every edition of the C.F.R. since 1974, and still appears there today.

Of course, EPA "amended" § 52.01 in 1978, "delet[ing] and reserv[ing]" § 52.01(f). 43 Fed. Reg. 26,388, 26,410 (June 19, 1978). But EPA left § 52.01(d) untouched. *Id.* EPA's revision of part of this regulation while leaving the remainder intact provides no basis for asserting that § 52.01(d) has been "superseded." To the contrary, it demonstrates that § 52.01(d) remains in full force.

Second, the contention that the Ohio and Indiana State Implementation Plans, or "SIPs," do not contain the definition of "modification" set forth in § 52.01 is simply incorrect. See U.S. Br. in Opp'n at 12-13; States Br. in Opp'n at 5. Respondents cite the regulations incorporating the "Federal [PSD] Implementation Plan," or "FIP," into the Ohio and Indiana SIPs, which appear in "part 52" of the C.F.R. See 40 C.F.R. § 52.793 (Indiana); *id.* § 52.1884 (Ohio). And the "General

Provisions" of part 52, which include § 52.01, apply to "*[a]ll terms* used in th[at] part." *Id.* § 52.01 (emphasis added).

Third, Respondents' contention that Cinergy long "knew" of EPA's 1999 enforcement interpretation relies upon a gross mischaracterization of Cinergy's arguments. Respondents make the facile observation that the New Source Review regulations use "actual emissions," in "tons-per-year"—a point that Cinergy has never disputed. U.S. Br. in Opp'n at 9; States Br. in Opp'n at 6-9; see Pet. Cert. 11-12. They also rely on contemporaneous documents addressing EPA's so-called "WEPCo Determination," which the Seventh Circuit ultimately rejected as unlawful. See U.S. Br. in Opp'n at 9-12; States' Br. in Opp'n at 6-9; see also *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901, 917-18 (7th Cir. 1990). The merits of these arguments have been fully briefed, and the Court likely will address them in *Duke Energy*. If it does not, they should be addressed on writ of certiorari in this case. They provide no reason to deny the petition at the outset.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition for certiorari, the petition should be held for and disposed of in light of the Court's decision in *Duke Energy*.

Respectfully submitted,

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